EUROPEAN IMMIGRATION AND ASYLUM LAW

VOLUME II: CASES

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2011-2012

Erasmus Teaching Staff Mobility

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1. ECJ C-60/00, Carpenter, 11 July 2002

JUDGMENT OF THE COURT

11 July 2002 (1)

(Freedom to provide services - Article 49 EC - Directive 73/148/EEC - National of a Member State established in that State and providing services to persons established in other Member States - Right of residence in that State of a spouse who is a national of a third country)

In Case C-60/00,

REFERENCE to the Court under Article 234 EC by the Immigration Appeal Tribunal (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Mary Carpenter

and

Secretary of State for the Home Department,

on the interpretation of Article 49 EC and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14),

THE COURT,

gives the following

Judgment

1. By order of 16 December 1999, received at the Court on 21 February 2000, the Immigration Appeal Tribunal referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 49 EC and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14, hereinafter 'the Directive').

2. The question was raised in proceedings between Mrs Carpenter, a national of the Philippines, and the Secretary of State for the Home Department (hereinafter 'the Secretary of State') concerning her right to reside in the United Kingdom.

Legislative framework

Community legislation

3. The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

4. The first recital of the preamble to the Directive states as follows:

'Whereas freedom of movement of persons as provided for in the Treaty and the General Programmes for the abolition of restrictions on freedom of establishment and on freedom to provide services entails the abolition of restrictions on movement and residence within

the Community for nationals of Member States wishing to establish themselves or to provide services within the territory of another Member State'.

5. Article 1(1) of the Directive provides:

'The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b) nationals of Member States wishing to go to another Member State as recipients of services;

(c) the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.'

6. The first subparagraph of Article 4(2) of the Directive provides:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.'

United Kingdom legislation

7. In terms of the Immigration Act 1971 and the 1994 United Kingdom Immigration Rules (House of Commons Paper 395, hereinafter 'the Immigration Rules'), a person who is not a British citizen may not, as a general rule, enter or remain in the United Kingdom unless he has obtained permission to do so. Such permission is called respectively 'leave to enter' and 'leave to remain'.

8. Section 7(1) of the Immigration Act 1988 provides:

'A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.'

9. Paragraph 281 of the Immigration Rules lists the requirements for leave to enter the United Kingdom as the spouse of a person present and settled in the United Kingdom. Paragraph 281(vi) states that the applicant must hold a valid United Kingdom entry clearance for entry as a spouse. However, a person present in the United Kingdom with leave to enter or remain in another capacity may switch into the spouse category if he or she satisfies the requirements of paragraph 284 of the Immigration Rules.

10. Paragraph 284 of the Immigration Rules lays down the requirements for an extension of stay in the United Kingdom as the spouse of a person present and settled in the United Kingdom. Paragraph 284(i) provides that the applicant must have limited leave to remain in the United Kingdom (this would include leave to enter) and Paragraph 284(iv) states that the applicant must not have remained in breach of the immigration laws.

11. Section 3(5)(a) of the Immigration Act 1971 lays down the general rules relating to deportation from the United Kingdom. It provides:

'A person who is not a British Citizen shall be liable to deportation from the United Kingdom -

(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave ...'.

12. As regards, more particularly, the deportation of spouses of UK nationals, the Secretary of State is required, under paragraph 364 of the Immigration Rules, to consider the particular circumstances of each case before deciding whether or not to order deportation. However, a published policy concession, DP 3/96, sets out the circumstances in which the Secretary of State will normally grant leave to remain to spouses who are liable to deportation or who are in the United Kingdom illegally. Paragraph 5 of the concession states that, as a general rule, deportation action should not normally be initiated where the person concerned has a genuine and subsisting marriage with someone settled in the United Kingdom and the couple have lived together in the United Kingdom

continuously since their marriage for at least two years before the commencement of enforcement action, and it is unreasonable to expect the settled spouse to accompany his/her spouse on removal.

The dispute in the main proceedings

13. Mrs Carpenter, a national of the Philippines, was given leave to enter the United Kingdom as a visitor on 18 September 1994 for six months. She overstayed that leave and failed to apply for any extension of her stay. On 22 May 1996 she married Peter Carpenter, a United Kingdom national.

14. It appears from the order for reference that Mr Carpenter runs a business selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals. The business is established in the UK, where the publishers of the journals for which he sells advertising space are based. A significant proportion of the business is conducted with advertisers established in other Member States of the European Community. Mr Carpenter travels to other Member States for the purpose of his business.

15. On 15 July 1996 Mrs Carpenter applied to the Secretary of State for leave to remain in the UK as the spouse of a national of that Member State. Her application was refused by a decision of the Secretary of State of 21 July 1997.

16. The Secretary of State also decided to make a deportation order against Mrs Carpenter removing her to the Philippines. Under that decision it is open to Mrs Carpenter to leave the United Kingdom voluntarily. If she does not do so, the Secretary of State will sign the deportation order and Mrs Carpenter will have to obtain its revocation before she can seek leave to enter the United Kingdom as the spouse of a UK citizen.

17. Mrs Carpenter appealed against the decision to make a deportation order to an Immigration Adjudicator (United Kingdom), arguing that the Secretary of State was not entitled to deport her because she was entitled to a right to remain in the United Kingdom under Community law. She maintained that since her husband's business required him to travel around in other Member States, providing and receiving services, he could do so more easily as she was looking after his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services.

18. The Immigration Adjudicator was satisfied that Mrs Carpenter's marriage was genuine and that she played an important part in the upbringing of her stepchildren. He also accepted that she could be indirectly responsible for the increased success of her husband's business and that her husband was a provider of services for the purposes of Community law. According to the Immigration Adjudicator, Mr Carpenter has the right to travel to other Member States to provide services and to be accompanied for that purpose by his spouse. However, while he is resident in the United Kingdom, he cannot be considered to be exercising any freedom of movement within the meaning of Community law. The Immigration Adjudicator therefore dismissed Mrs Carpenter's appeal by decision of 10 June 1998.

19. On Mrs Carpenter's appeal to the Immigration Appeal Tribunal, it considered that the issue of Community law raised by the proceedings before it was whether it was contrary to Community law and, in particular, Article 49 EC and/or the Directive, for the Secretary of State to refuse to grant a right of residence to, and to decide to deport Mrs Carpenter where, first, Mr Carpenter was exercising his freedom to provide services in other Member States, and second, the childcare and homemaking performed by Mrs Carpenter might indirectly assist and facilitate Mr Carpenter's exercise of his rights under Article 49 EC, by providing him with economic assistance which permitted him to spend greater time on his business.

20. Since it considered that the case turned on the interpretation of Community law, the Immigration Appeal Tribunal decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'In circumstances where:

(a) a national of a Member State, who is established in that Member State and who provides services to persons in other Member States; and

(b) has a spouse who is not a national of a Member State;

can the non-national spouse rely on

(i) Article 49 EC and/or

(ii) Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services,

to provide the non-national spouse with the right to reside with his or her spouse in his or her spouse's Member State of origin?

Is the answer to the question referred different if the non-national spouse indirectly assists the national of a Member State in carrying on the provision of services in other Member States by carrying out childcare?'

The question referred

Observations submitted to the Court

21. Mrs Carpenter admits that she has no right of her own to reside in any Member State but claims that her rights derive from those enjoyed by Mr Carpenter to provide services and to travel within the European Union. Her husband is entitled to carry on his business throughout the internal market without being subjected to unlawful restrictions. Her deportation would require Mr Carpenter to go to live with her in the Philippines or separate the members of the family unit if he remained in the United Kingdom. In both cases Mr Carpenter's business would be affected. Moreover it cannot be maintained that the restriction on the freedom to provide services, to which Mr Carpenter would be subjected if his spouse was deported, would be a purely internal matter, since he provides services throughout the internal market.

22. According to the United Kingdom Government the provisions of the Directive mean, for example, that a UK national wishing to provide services in another Member State is entitled to reside in that State for the period during which the services are provided, and that his or her spouse would be entitled to reside there for the same period. Those provisions do not, however, give any right of residence in the United Kingdom to UK nationals, who have such a right in any event under United Kingdom law, or to their spouses. The Court has confirmed that interpretation in its judgment in Case C-370/90 *Singh* [1992] ECR I-4265, paragraphs 17 and 18.

23. The United Kingdom Government points out that, in its judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, the Court considered the question whether a national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the EC Treaty (now, after amendment, Article 43 EC) against his Member State of origin, on whose territory he pursues another activity as a self-employed person. The Court held, at paragraph 32 of that judgment, that, although the provisions of the Treaty relating to freedom of establishment cannot be applied to situations which are purely internal to a Member State, the scope of Article 52 of the Treaty nevertheless cannot be interpreted in such a way as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty.

24. However, since Mr Carpenter has not exercised his right to freedom of movement, his spouse cannot rely on *Singh* or *Asscher*, cited above. Therefore, a person in Mrs Carpenter's position is not entitled to derive from Community law any right to enter or remain in the United Kingdom.

25. According to the Commission, the situation of Mrs Carpenter must be clearly distinguished from that of a spouse of a national of a Member State who has exercised his right to freedom of movement and has left his Member State of origin and moved to another Member State in order to become established or to work there.

26. In that case the spouse, whatever his or her nationality, would undoubtedly be covered by Community law, and would be entitled to establish himself or herself, with the Community national in the host Member State, since otherwise that national might be deterred from exercising his or her right to freedom of movement. Also, as the Court held at paragraph 23 of its judgment in *Singh*, cited above, when that Community national returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law, if his or her spouse chose to enter and reside in another Member State.

27. On the other hand, the principle expressed in paragraph 23 of the judgment in *Singh*,

cited above, cannot be applied to a situation such as that in issue in the main proceedings, in which a national of a Member State has never sought to establish himself with his spouse in another Member State but merely provides services from his State of origin. The Commission submits that such a situation is rather to be classified as an internal situation within the meaning of the judgment in Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, so that Mrs Carpenter's right to remain in the United Kingdom, if it exists, depends exclusively on United Kingdom law.

Findings of the Court

28. It is to be noted, at the outset, that the provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation, are not applicable to situations which do not present any link to any of the situations envisaged by Community law (see, to that effect, among others, Case C-97/98 *Jägerskiöld* [1999] ECR I-7319, paragraphs 42 to 45).

29. As is apparent from paragraph 14 of this judgment, a significant proportion of Mr Carpenter's business consists of providing services, for remuneration, to advertisers established in other Member States. Such services come within the meaning of 'services' in Article 49 EC both in so far as the provider travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established (see, in respect of 'cold-calling', Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 15 and 20 to 22).

30. Mr Carpenter is therefore availing himself of the right freely to provide services guaranteed by Article 49 EC. Moreover, as the Court has frequently held, that right may be relied on by a provider as against the State in which he is established if the services are provided for persons established in another Member State (see, among others, *Alpine Investments*, cited above, paragraph 30).

31. With regard to the right of establishment and the freedom to provide services, the Directive aims to abolish restrictions on the movement and residence of nationals of Member States within the Community.

32. It follows both from the objective of the Directive and the wording of Article 1(1)(a) and (b) thereof, that it applies to cases where nationals of Member States leave their Member State of origin and move to another Member State in order to establish themselves there, or to provide services in that State, or to receive services there.

33. That interpretation is borne out, in particular, by Article 2(1) of the Directive, whereby 'Member States shall grant the persons referred to in Article 1 the right to leave their territory'; Article 3(1), whereby 'Member States shall grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport'; Article 4(1), whereby '[e]ach Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory'; and Article 4(2) of the Directive, whereby, '[t]he right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided'.

34. It is true that Article 1(1)(c) of the Directive extends to the spouses of the Member States' nationals referred to in subparagraphs (a) and (b) of that article the right to enter and reside in another Member State, irrespective of their nationality. But, in so far as the Directive aims to facilitate the exercise by Member States' nationals of freedom of establishment and freedom to provide services, the rights were accorded to their spouses so that they can accompany them when they exercise, in the circumstances provided for by the Directive, the rights which they derive from the Treaty by moving to or residing in a Member State other than their Member State of origin.

35. Therefore, it follows from both its objectives and its content that the Directive governs the conditions under which a national of a Member State, and the other persons covered by Article 1(1)(c) and (d), may leave that national's Member State of origin and enter and reside in another Member State, for one of the purposes set out in Article 1(1)(a) and (b), for a period specified in Article 4(1) or (2).

36. Since the Directive does not govern the right of residence of members of the family of a provider of services in his Member State of origin, the answer to the question referred to the Court therefore depends on whether, in circumstances such as those in the main

proceedings, a right of residence in favour of the spouse may be inferred from the principles or other rules of Community law.

37. As has been held in paragraphs 29 and 30 of this judgment, Mr Carpenter is exercising the right freely to provide services guaranteed by Article 49 EC. The services provided by Mr Carpenter make up a significant proportion of his business, which is carried on both within his Member State of origin for the benefit of persons established in other Member States, and within those States.

38. In that context it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community (see, for example, Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475); Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), and Articles 1(1)(c) and 4 of the Directive).

39. It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, *Singh*, cited above, paragraph 23).

40. A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24).

41. The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.

42. Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is 'in accordance with the law', motivated by one or more of the legitimate aims under that paragraph and 'necessary in a democratic society', that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif* v *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX).

43. A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.

44. Although, in the main proceedings, Mr Carpenter's spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety. Moreover, it is clear that Mr and Mrs Carpenter's marriage, which was celebrated in the United Kingdom in 1996, is genuine and that Mrs Carpenter continues to lead a true family life there, in particular by looking after her husband's children from a previous marriage.

45. In those circumstances, the decision to deport Mrs Carpenter constitutes an infringement which is not proportionate to the objective pursued.

46. In view of all the foregoing, the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

Costs

47. The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Immigration Appeal Tribunal by order of 16 December 1999, hereby rules:

Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

2. ECJ C-200/02, Zhu en Chen, 19 October 2004

JUDGMENT OF THE COURT (sitting as a full Court)
19 October 2004

(Right of residence – Child with the nationality of one Member State but residing in another Member State – Parents nationals of a non-member country – Mother's right to reside in the other Member State)

In Case C-200/02,

REFERENCE to the Court under Article 234 EC

from the Immigration Appellate Authority (United Kingdom), made by decision of 27 May 2002, received at the Court on 30 May 2002, in the proceedings

Kunqian Catherine Zhu,

Man Lavette Chen,

v

Secretary of State for the Home Department,

THE COURT (sitting as a full Court),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and of Article 18 EC.

2

The reference was made in the course of proceedings brought by Kunqian Catherine Zhu (hereinafter 'Catherine'), of Irish nationality, and her mother, Man Lavette Chen (hereinafter 'Mrs Chen'), a Chinese national, against the Secretary of State for the Home Department concerning the latter's rejection of applications by Catherine and Mrs Chen for a long-term permit to reside in the United Kingdom.

Legal background

Community legislation

3

Article 1 of Directive 73/148 provides:

'1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a)

nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b)

nationals of Member States wishing to go to another Member State as recipients of services;

(c)

the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;

(d)

the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.

2.

Member States shall favour the admission of any other member of the family of a national referred to in paragraph 1(a) or (b) or of the spouse of that national, which member is dependent on that national or spouse of that national or who in the country of origin was living under the same roof.'

4

Article 4(2) of the same directive states:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.'

5

Under Article 1 of Directive 90/364:

'1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of persons admitted pursuant to paragraph 2.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a)

his or her spouse and their descendants who are dependants;

(b)

dependent relatives in the ascending line of the holder of the right of residence and his or her spouse.'

The United Kingdom legislation

6

Under Regulation 5 of the Immigration (European Economic Area) Regulations 2000 (the 'EEA Regulations'):

'1. In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as (a) a worker; (b) a self employed person; (c) a provider of services; (d) a recipient of services; (e) a self sufficient person; (f) a retired person; (g) a student; or (h) a self employed person who has ceased activity; or who is a person to whom paragraph (4) applies.

…'

The main proceedings and the questions referred to the Court of Justice

7

The order for reference states that Mrs Chen and her husband, both of Chinese nationality, work for a Chinese undertaking established in China. Mrs Chen's husband is a director and the majority shareholder of that company. For the purposes of his work, he travels frequently to various Member States, in particular the United Kingdom.

8

The couple's first child was born in the People's Republic of China in 1998. Mrs Chen, who wished to give birth to a second child, entered the United Kingdom in May 2000 when she was about six months pregnant. She went to Belfast in July of the same year and Catherine was born there on 16 September 2000. The mother and her child live at present in Cardiff, Wales (United Kingdom).

9

Under section 6(1) of the Irish Nationality and Citizenship Act of 1956, which was amended in 2001 and applies retroactively as from 2 December 1999, Ireland allows any person born on the island of Ireland to acquire Irish nationality. Under section 6(3), a person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.

10

Under those rules, Catherine was issued with an Irish passport in September 2000. According to the order for reference, Catherine is not entitled, on the other hand, to acquire United Kingdom nationality since, in enacting the British Nationality Act 1981, the United Kingdom departed from the *jus soli*, so that birth in the territory of that Member State no longer automatically confers United Kingdom nationality.

11

It is common ground that Mrs Chen took up residence in the island of Ireland in order to enable the child she was expecting to acquire Irish nationality and, consequently, to enable her to acquire the right to reside, should the occasion arise, with her child in the United Kingdom.

12

The referring court also observes that Ireland forms part of the Common Travel Area within the meaning of the Immigration Acts, so that, because Irish nationals do not as a general rule have to obtain a permit to enter and reside in the United Kingdom, Catherine, in contrast to Mrs Chen, may move freely within the United Kingdom and within Ireland. Aside from Catherine's right of free movement limited to those two Member States, neither of the appellants in the main proceedings is entitled to reside in the United Kingdom under its domestic legislation.

13

The order for reference also makes it clear that Catherine is dependent both emotionally and financially on her mother, that her mother is her primary carer, that Catherine receives private medical services and child-care services in return for payment in the United Kingdom, that she lost the right to acquire Chinese nationality by virtue of having been born in Northern Ireland and her subsequent acquisition of Irish nationality and, as a result, that she only has the right to enter Chinese territory under a visa allowing residence for a maximum of 30 days per visit; that the two appellants in the main proceedings provide for their needs by reason of Mrs Chen's employment, that the appellants do not rely upon public funds in the United Kingdom and there is no realistic possibility of their becoming so reliant, and, finally, that the appellants are insured against ill health.

14

The Secretary of State for the Home Department's refusal to grant a long-term residence permit to the two appellants in the main proceedings was based on the fact that Catherine, a child of eight months of age, was not exercising any rights arising from the EC Treaty such as those laid down by Regulation 5(1) of the EEA Regulations and the fact that Mrs Chen was not entitled to reside in the United Kingdom under those regulations.

15

The decision not to grant a permit was the subject of an appeal to the Immigration Appellate Authority, which stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. On the facts of the present case, does Article 1 of Council Directive 73/148/EEC or in the alternative Article 1 of Council Directive 90/364/EEC:

(a)

confer the right on the First Appellant, who is a minor and a citizen of the Union, to enter and reside in the host Member State?

(b)

and if so, does it consequently confer the right on the Second Appellant, a third country national who is the First Appellant's mother and primary carer, to reside with the First Appellant (i) as her dependent relative, or (ii) because she lived with the First Appellant in her country of origin, or (iii) on any other special basis?

2. If and to the extent that the First Appellant is not a 'national of a Member State' for purposes of exercising Community rights pursuant to Council Directive 73/148/EEC or Article 1 of Council Directive 90/364/EEC, what then are the relevant criteria for identifying whether a child, who is a citizen of the Union, is a national of a Member State for purposes of exercising Community rights?

3. In the circumstances of the present case, does the receipt of child care by the First Appellant constitute services for purposes of Council Directive 73/148/EEC?

4. In the circumstances of the present case, is the First Appellant precluded from residing in the host State pursuant to Article 1 of Council Directive 90/364/EEC because her resources are provided exclusively by her third country national parent who accompanies her?

5. On the special facts of this case does Article 18(1) EC give the First Appellant the right to enter and reside in the host Member State even when she does not qualify for residence in the host State under any other provision of EU law?

6. If so, does the Second Appellant consequently enjoy the right to remain with the First Appellant, during that time in the host State?

7. In this context, what is the effect of the principle of respect for fundamental human rights under Community law claimed by the Appellants, in particular where the Appellants rely on Article 8 ECHR that everyone has the right to respect for his private and family life and his home in conjunction with Article 14 ECHR given that the First Appellant cannot live in China with the Second Appellant and her father and brother?'

The questions referred to the Court of Justice

16

By those questions, the national court seeks in essence to ascertain whether Directive 73/148, Directive 90/364 or Article 18 EC, if appropriate, read in conjunction with Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), confer, in circumstances such as those of the main proceedings, upon a young minor who is a national of a Member State, and is in the care of a parent who is a national of a non-member

country, the right to reside in another Member State where the minor receives child-care services. If such right be conferred, the national court wishes to ascertain whether those same provisions consequently confer a right of residence on the parent concerned.

17

It is therefore necessary to examine the provisions of Community law concerning the right of residence in the light of the situation of a national not of legal age such as Catherine, and then that of a parent who is a national of a non-member country and looks after the child.

The right of residence of a person in Catherine's situation

Preliminary considerations

18

The Irish and United Kingdom Governments' contention that a person in Catherine's situation cannot claim the benefit of the provisions of Community law on free movement of persons and residence simply because that person has never moved from one Member State to another Member State must be rejected at the outset.

19

The situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation, thereby depriving that national of the benefit in the host Member State of the provisions of Community law on freedom of movement and of residence (to that effect, see, in particular, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 13 and 27).

20

Moreover, contrary to the Irish Government's contention, a young child can take advantage of the rights of free movement and residence guaranteed by Community law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally (to that effect, see, in particular, in the context of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, Series I, 1968 (II), p. 475), Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 21, and Case C-413/99 *Baumbastand R* [2002] ECR I-7091, paragraphs 52 to 63, and, in relation to Article 17 EC, *Garcia Avello*, paragraph 21). Moreover, as the Advocate General made clear in points 47 to 52 of his Opinion, it does not follow either from the terms of, or from the aims pursued by, Articles 18 EC and 49 EC and Directives 73/148 and 90/364 that the enjoyment of the rights with which those provisions are concerned should be made conditional upon the attainment of a minimum age.

Directive 73/148

21

The national court wishes to ascertain whether a person in Catherine's situation may rely on the provisions of Directive 73/148 with a view to residing on a long-term basis in the United Kingdom as a recipient of child-care services provided in return for payment.

22

According to the case-law of the Court, the provisions on freedom to provide services do not cover the situation of a national of a Member State who establishes his principal residence in the territory of another Member State with a view to receiving services there for an indefinite period (to that effect, see, in particular, Case 196/87 *Steymann* [1988] ECR 6159). The child-care services to which the national court refers fall precisely within that case.

23

As regards the medical services that Catherine is receiving on a temporary basis, it must be observed that, under the first subparagraph of Article 4(2) of Directive 73/148, the right of residence of persons receiving services by virtue of the freedom to provide services is co-terminous with the duration of the period for which they are provided. Consequently, that directive cannot in any event serve as a basis for a right of residence of indefinite duration of the kind with which the main proceedings are concerned.

Article 18 EC and Directive 90/364

24

Since Catherine cannot rely on Directive 73/148 for a right of long-term residence in the United

Kingdom, the national court would like to know whether Catherine might have a right to long-term residence under Article 18 EC and under Directive 90/364, which, subject to certain conditions, guarantees such a right for nationals of Member States to whom it is not available under other provisions of Community law, and for members of their families.

25

By virtue of Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (see, in particular, *Baumbast and R*, paragraph 82).

26

As regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC. That right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, in particular, *Baumbast and R*, paragraphs 84 and 85).

27

With regard to those limitations and conditions, Article 1(1) of Directive 90/364 provides that the Member States may require that the nationals of a Member State who wish to benefit from the right to reside in their territory and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

28

It is clear from the order for reference that Catherine has both sickness insurance and sufficient resources, provided by her mother, for her not to become a burden on the social assistance system of the host Member State.

29

The objection raised by the Irish and United Kingdom Governments that the condition concerning the availability of sufficient resources means that the person concerned must, in contrast to Catherine's case, possess those resources personally and may not use for that purpose those of an accompanying family member, such as Mrs Chen, is unfounded.

30

According to the very terms of Article 1(1) of Directive 90/364, it is sufficient for the nationals of Member States to 'have' the necessary resources, and that provision lays down no requirement whatsoever as to their origin.

31

The correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.

32

Moreover, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus, although, according to the fourth recital in the preamble to Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, the Court nevertheless observed that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the principle of proportionality (see, in particular, *Baumbast and R*, paragraphs 90 and 91).

33

An interpretation of the condition concerning the sufficiency of resources within the meaning of Directive 90/364, in the terms suggested by the Irish and United Kingdom Governments would add to that condition, as formulated in that directive, a requirement as to the origin of the resources which, not being necessary for the attainment of the objective pursued, namely the protection of the public finances of the Member States, would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC.

34

The United Kingdom Government contends, finally, that the appellants in the main proceedings are not entitled to rely on the Community provisions in question because Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constitutes an attempt improperly to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in its view, served where a national of a non-member country wishing to reside in a Member State, without however moving or wishing to move from one Member State to another, arranges matters in such a way as to give birth to a child in a part of the host Member State to which another Member State applies its rules governing acquisition of nationality *jure soli*. It is, in their view, settled case-law that Member States are entitled to take measures to prevent individuals from improperly taking advantage of provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation. That rule, which is in conformity with the principle that rights must not be abused, was in their view reaffirmed by the Court in its judgment in Case C-212/97 *Centros* [1999] ECR I-1459.

35

That argument must also be rejected.

36

It is true that Mrs Chen admits that the purpose of her stay in the United Kingdom was to create a situation in which the child she was expecting would be able to acquire the nationality of another Member State in order thereafter to secure for her child and for herself a long-term right to reside in the United Kingdom.

37

Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality (see, in particular, Case C-369/90 *Micheletti and Others* [1992] ECR I-4329, paragraph 10, and Case C-192/99 *Kaur* [2001] ECR I-1237, paragraph 19).

38

None of the parties that submitted observations to the Court has questioned either the legality, or the fact, of Catherine's acquisition of Irish nationality.

39

Moreover, it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see, in particular, *Micheletti*, paragraph 10, and *Garcia Avello*, paragraph 28).

40

However, that would be precisely what would happen if the United Kingdom were entitled to refuse nationals of other Member States, such as Catherine, the benefit of a fundamental freedom upheld by Community law merely because their nationality of a Member State was in fact acquired solely in order to secure a right of residence under Community law for a national of a non-member country.

41

Accordingly, in circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.

The right of residence of a person in Mrs Chen's situation

42

Article 1(2)(b) of Directive 90/364, which guarantees 'dependent' relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen's situation either by reason of the emotional bonds between mother and child or on the ground that the mother's right to enter and reside in the United Kingdom is dependent on her child's right of residence.

43

According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that

material support for the family member is provided by the holder of the right of residence (see, to that effect, in relation to Article 10 of Regulation No 1612/68, Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 20 to 22).

44

In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a 'dependent' relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom.

45

On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see, *mutatis mutandis*, in relation to Article 12 of Regulation No 1612/68, *Baumbast and R*, paragraphs 71 to 75).

46

For that reason alone, where, as in the main proceedings, Article 18 EC and Directive 90/364 grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

47

The answer to be given to the national court must therefore be that, in circumstances like those of the main proceedings, Article 18 EC and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

Costs

48

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (sitting as a full Court) hereby rules:

> **In circumstances like those of the main proceedings, Article 18 EC and Council Directive 90/364/EEC of 28 June 1990 on the right of residence confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.**

3. ECJ C-127/08, Metock, 25 July 2008

JUDGMENT OF THE COURT (Grand Chamber)

25 July 2008

(Directive 2004/38/EC – Right of Union citizens and their family members to move and reside freely in the territory of a Member State – Family members who are nationals of non-member

countries – Nationals of non-member countries who entered the host Member State before becoming spouses of Union citizens)

In Case C-127/08,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court (Ireland), made by decision of 14 March 2008, received at the Court on 25 March 2008, in the proceedings

Blaise Baheten Metock,

Hanette Eugenie Ngo Ikeng,

Christian Joel Baheten,

Samuel Zion Ikeng Baheten,

Hencheal Ikogho,

Donna Ikogho,

Roland Chinedu,

Marlene Babucke Chinedu,

Henry Igboanusi,

Roksana Batkowska

v

Minister for Justice, Equality and Law Reform,

THE COURT (Grand Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda (OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28)).

2 The reference was made in the course of four applications for judicial review before the High Court, each seeking inter alia an order of certiorari quashing the decision of the Minister for Justice, Equality and Law Reform ('the Minister for Justice') refusing to grant a residence card to a national of a non-member country married to a Union citizen residing in Ireland.

Legal context

Community legislation

3 Directive 2004/38 was adopted on the basis of Articles 12 EC, 18 EC, 40 EC, 44 EC and 52 EC.

4 Recitals 1 to 5, 11, 14 and 31 in the preamble to that directive read as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act …

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality …

…

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

…

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

…

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation'.

5 According to Article 1(a) of Directive 2004/38, the directive concerns inter alia 'the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members'.

6 According to Article 2(2)(a) of Directive 2004/38, for the purposes of the directive, 'family member' means inter alia the spouse.

7 Article 3 of Directive 2004/38, 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

8 Article 5 of Directive 2004/38, 'Right of entry', states:

'1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

…

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

…

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.'

9 Article 7 of Directive 2004/38, 'Right of residence for more than three months', states:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; …

…

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

…'

10 Article 9 of Directive 2004/38, 'Administrative formalities for family members who are not nationals of a Member State', provides:

'1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.'

11 Article 10 of Directive 2004/38, 'Issue of residence cards', provides:

'1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

…'

12 Article 27 of Directive 2004/38, which appears in Chapter VI of the directive, 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', provides in paragraphs 1 and 2:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.'

13 Article 35 of Directive 2004/38, 'Abuse of rights', provides:

'Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.'

14 As stated in Article 38 of Directive 2004/38, it repealed inter alia Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68').

National legislation

15 At the material time, Directive 2004/38 was transposed into Irish law by the European Communities (Free Movement of Persons) (No 2) Regulations 2006, which were made on 18 December 2006 and entered into force on 1 January 2007 ('the 2006 Regulations').

16 Regulation 3(1) and (2) of the 2006 Regulations provides:

'(1) These Regulations shall apply to –

(a) Union citizens,

(b) subject to paragraph (2), qualifying family members of Union citizens who are not themselves Union citizens, and

(c) subject to paragraph (2), permitted family members of Union citizens.

(2) These Regulations shall not apply to a family member unless the family member is lawfully resident in another Member State and is –

(a) seeking to enter the State in the company of a Union citizen in respect of whom he or she is a family member, or

(b) seeking to join a Union citizen, in respect of whom he or she is a family member, who is lawfully present in the State.'

17 'Qualifying family members of Union citizens' within the meaning of Regulation 3 of the 2006 Regulations include spouses of Union citizens.

The main proceedings

The Metock case

18 Mr Metock, a national of Cameroon, arrived in Ireland on 23 June 2006 and applied for asylum. His application was definitively refused on 28 February 2007.

19 Ms Ngo Ikeng, born a national of Cameroon, has acquired United Kingdom nationality. She has resided and worked in Ireland since late 2006.

20 Mr Metock and Ms Ngo Ikeng met in Cameroon in 1994 and have been in a relationship since then. They have two children, one born in 1998 and the other in 2006. They were married in Ireland on 12 October 2006.

21 On 6 November 2006 Mr Metock applied for a residence card as the spouse of a Union citizen working and residing in Ireland. The application was refused by decision of the Minister for Justice of 28 June 2007, on the ground that Mr Metock did not satisfy the condition of prior lawful residence in another Member State required by Regulation 3(2) of the 2006 Regulations.

22 Mr Metock, Ms Ngo Ikeng and their children brought proceedings against that decision.

The Ikogho case

23 Mr Ikogho, a national of a non-member country, arrived in Ireland in November 2004 and applied for asylum. His application was definitively refused and the Minister for Justice made a deportation order against him on 15 September 2005. A challenge to the deportation order was dismissed by order of the High Court of 19 June 2007.

24 Mrs Ikogho, who is a United Kingdom national and a Union citizen, has resided and worked in Ireland since 1996.

25 Mr and Mrs Ikogho met in Ireland in December 2004 and were married there on 7 June 2006.

26 On 6 July 2006 Mr Ikogho applied for a residence card as the spouse of a Union citizen residing and working in Ireland. His application was refused by decision of the Minister for Justice of 12 January 2007, on the ground that, by reason of the deportation order of 15 September 2005, Mr Ikogho was staying in Ireland illegally at the time of his marriage.

27 Mr and Mrs Ikogho brought proceedings against that decision.

The Chinedu case

28 Mr Chinedu, a Nigerian national, arrived in Ireland in December 2005 and applied for asylum. His application was definitively refused on 8 August 2006. Ms Babucke, of German nationality, is lawfully resident in Ireland.

29 Mr Chinedu and Ms Babucke were married in Ireland on 3 July 2006.

30 By application received by the Minister for Justice on 1 August 2006, Mr Chinedu applied for a residence card as the spouse of a Union citizen. The application was refused by decision of the Minister for Justice of 17 April 2007, on the ground that Mr Chinedu did not satisfy the condition of prior lawful residence in another Member State required by Regulation 3(2) of the 2006 Regulations.

31 Mr Chinedu and Ms Babucke brought proceedings against that decision.

The Igboanusi case

32 Mr Igboanusi, a Nigerian national, arrived in Ireland on 2 April 2004 and applied for asylum. His application was refused on 31 May 2005 and the Minister for Justice made a deportation order against him on 15 September 2005.

33 Ms Batkowska, a Polish national, has resided and worked in Ireland since April 2006.

34 Mr Igboanusi and Ms Batkowska met in Ireland and were married there on 24 November 2006.

35 On 27 February 2007 Mr Igboanusi applied for a residence card as the spouse of a Union citizen. His application was refused by decision of the Minister for Justice of 27 August 2007, on the ground that Mr Igboanusi did not satisfy the condition of prior lawful residence in another Member State required by Regulation 3(2) of the 2006 Regulations.

36 Mr Igboanusi and Ms Batkowska brought proceedings against that decision.

37 On 16 November 2007 Mr Igboanusi was arrested and detained pursuant to the deportation order against him. He was deported to Nigeria in December 2007.

The main proceedings and the order for reference

38 The four cases were heard together before the national court.

39 All the applicants in the main proceedings submitted essentially that Regulation 3(2) of the 2006 Regulations is not compatible with Directive 2004/38.

40 They argued that nationals of non-member countries who are spouses of Union citizens have a right, consequential to and dependent on that of the Union citizen, to move and reside in a Member State other than that of which the Union citizen is a national, a right which derives from the family relationship alone.

41 They submitted that Directive 2004/38 governs exhaustively the conditions of entry into and residence in a Member State for a Union citizen who is a national of another Member State and his family members, so that the Member States are not entitled to impose additional conditions. Since the directive makes no provision for a condition of prior lawful residence in another Member State, such as that imposed by the Irish legislation, that legislation is not consistent with Community law.

42 The applicants in the main proceedings further submitted that a national of a non-member country who becomes a family member of a Union citizen while that citizen is resident in a Member State other than that of which he is a national accompanies that citizen within the meaning of Articles 3(1) and 7(2) of Directive 2004/38.

43 The Minister for Justice replied essentially that Directive 2004/38 does not preclude the condition of prior lawful residence in another Member State laid down in Regulation 3(2) of the 2006 Regulations.

44 He submitted that there is a division of competences between the Member States and the Community, under which the Member States have competence in relation to the admission into a Member State of nationals of non-member countries coming from outside Community territory, while the Community has competence to regulate the movement of Union citizens and their family members within the Union.

45 He argued that Directive 2004/38 therefore leaves Member States discretion to impose on nationals of non-member countries who are spouses of Union citizens a condition of prior lawful residence in another Member State. Moreover, that such a condition is consistent with Community law follows from Case C-109/01 *Akrich* [2003] ECR I-9607 and Case C-1/05 *Jia* [2007] ECR I-1.

46 The national court points out that none of the marriages in question is a marriage of convenience.

47 Since it considered that an interpretation of Directive 2004/38 was necessary for it to give judgment in the main proceedings, the High Court decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC?

(2) Does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national who is:

– a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and

– is then residing in the host Member State with the Union citizen as his/her spouse

irrespective of when or where their marriage took place or when or how the non-EU national entered the host Member State?

(3) If the answer to the preceding question is in the negative does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:

– a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and

– resides in the host Member State with the Union citizen as his/her spouse

– has entered the host Member State independently of the Union citizen and

– subsequently married the Union citizen in the host Member State?'

The first question

48 By its first question the referring court asks whether Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

49 In the first place, it must be stated that, as regards family members of a Union citizen, no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State.

50 As Article 3(1) of Directive 2004/38 states, the directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State. The definition of family members in point 2 of Article 2 of Directive 2004/38 does not distinguish according to whether or not they have already resided lawfully in another Member State.

51 It must also be pointed out that Articles 5, 6(2) and 7(2) of Directive 2004/38 confer the rights of entry, of residence for up to three months, and of residence for more than three months in the host Member State on nationals of non-member countries who are family members of a Union citizen whom they accompany or join in that Member State, without any reference to the place or conditions of residence they had before arriving in that Member State.

52 In particular, the first subparagraph of Article 5(2) of Directive 2004/38 provides that nationals of non-member countries who are family members of a Union citizen are required to have an entry visa, unless they are in possession of the valid residence card referred to in Article 10 of that directive. In that, as follows from Articles 9(1) and 10(1) of Directive 2004/38, the residence card is the document that evidences the right of residence for more than three months in a Member State of the family members of a Union citizen who are not nationals of a Member State, the fact that Article 5(2) provides for the entry into the host Member State of family members of a Union citizen who do not have a residence card shows that Directive 2004/38 is capable of applying also to family members who were not already lawfully resident in another Member State.

53 Similarly, Article 10(2) of Directive 2004/38, which lists exhaustively the documents which nationals of non-member countries who are family members of a Union citizen may have to present to the host Member State in order to have a residence card issued, does not provide for the possibility of the host Member State asking for documents to demonstrate any prior lawful residence in another Member State.

54 In those circumstances, Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive and accompany or join the Union citizen in a Member State other than that of which he is a national, and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State.

55 That interpretation is supported by the Court's case-law on the instruments of secondary law concerning freedom of movement for persons adopted before Directive 2004/38.

56 Even before the adoption of Directive 2004/38, the Community legislature recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53; Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 26; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 41; Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 109; and Case C-291/05 *Eind* [2007] ECR I-0000, paragraph 44).

57 To that end, the Community legislature has considerably expanded, in Regulation No 1612/68 and in the directives on freedom of movement for persons adopted before Directive 2004/38, the application of Community law on entry into and residence in the territory of the Member States to nationals of non-member countries who are spouses of nationals of Member States (see, to that effect, Case C-503/03 *Commission* v *Spain*, paragraph 41).

58 It is true that the Court held in paragraphs 50 and 51 of *Akrich* that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, *MRAX*, paragraph 59, and Case C-157/03 *Commission* v *Spain*, paragraph 28).

59 The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals.

60 In the second place, the above interpretation of Directive 2004/38 is consistent with the division of competences between the Member States and the Community.

61 It is common ground that the Community derives from Articles 18(2) EC, 40 EC, 44 EC and 52 EC – on the basis of which Directive 2004/38 inter alia was adopted – competence to enact the necessary measures to bring about freedom of movement for Union citizens.

62 As already pointed out in paragraph 56 above, if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.

63 Consequently, within the competence conferred on it by those articles of the Treaty, the Community legislature can regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States, where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.

64 The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.

65 It follows that the Community legislature has competence to regulate, as it did by Directive 2004/38, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State.

66 Consequently, the interpretation put forward by the Minister for Justice and by several of the governments that have submitted observations that the Member States retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries must be rejected.

67 Indeed, to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.

68 That would not be compatible with the objective set out in Article 3(1)(c) EC of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses.

69 Furthermore, the interpretation mentioned in paragraph 66 above would lead to the paradoxical outcome that a Member State would be obliged, under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), to authorise the entry and residence of the spouse of a national of a non-member country lawfully resident in its territory where the spouse is not already lawfully resident in another Member State, but would be free to refuse the entry and residence of the spouse of a Union citizen in the same circumstances.

70 Consequently, Directive 2004/38 confers on all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive, and accompany or join the Union citizen in a Member State other than that of which he is a national, rights of entry into and residence in the host Member State, regardless of whether the national of a non-member country has already been lawfully resident in another Member State.

71 The Minister for Justice and several of the governments that have submitted observations contend, however, that, in a context typified by strong pressure of migration, it is necessary to control immigration at the external borders of the Community, which presupposes an individual examination of all the circumstances surrounding a first entry into Community territory. An interpretation of Directive 2004/38 prohibiting a host Member State from requiring prior lawful residence in another Member State would undermine the ability of the Member States to control immigration at their external frontiers.

72 The Minister for Justice submits in particular that that interpretation would have serious consequences for the Member States by bringing about a great increase in the number of persons able to benefit from a right of residence in the Community.

73 On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.

74 Second, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. Under Chapter VI of that directive, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal will be based on an individual examination of the particular case.

75 Moreover, in accordance with Article 35 of Directive 2004/38, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience, it being understood that any such measure must be proportionate and subject to the procedural safeguards provided for in the directive.

76 Those governments further submit that that interpretation of Directive 2004/38 would lead to unjustified reverse discrimination, in so far as nationals of the host Member State who have never exercised their right of freedom of movement would not derive rights of entry and residence from Community law for their family members who are nationals of non-member countries.

77 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-0000, paragraph 33).

78 Any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law.

79 Moreover, it should be recalled that all the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, which enshrines in Article 8 the right to respect for private and family life.

80 The answer to the first question must therefore be that Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

The second question

81 By its second question the referring court asks essentially whether the spouse of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State whose nationality he does not possess accompanies or joins that citizen within the meaning of Article 3(1) of Directive 2004/38, and consequently benefits from the provisions of that directive, irrespective of when and where the marriage took place and of the circumstances in which he entered the host Member State.

82 It should be noted at the outset that, as may be seen from recitals 1, 4 and 11 in the preamble, Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty.

83 Moreover, as recital 5 in the preamble to Directive 2004/38 points out, the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of dignity, be also granted to their family members, irrespective of nationality.

84 Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, *Eind*, paragraph 43).

85 Article 3(1) of Directive 2004/38 provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany or join them.

86 Articles 6 and 7 of Directive 2004/38, relating respectively to the right of residence for up to three months and the right of residence for more than three months, likewise require that the family members of a Union citizen who are not nationals of a Member State 'accompany' or 'join' him in the host Member State in order to enjoy a right of residence there.

87 First, none of those provisions requires that the Union citizen must already have founded a family at the time when he moves to the host Member State in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that directive.

88 By providing that the family members of the Union citizen can join him in the host Member State, the Community legislature, on the contrary, accepted the possibility of the Union citizen not founding a family until after exercising his right of freedom of movement.

89 That interpretation is consistent with the purpose of Directive 2004/38, which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national. Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.

90 It must therefore be held that nationals of non-member countries who are family members of a Union citizen derive from Directive 2004/38 the right to join that Union citizen in the host Member State, whether he has become established there before or after founding a family.

91 Second, it must be determined whether, where the national of a non-member country has entered a Member State before becoming a family member of a Union citizen who resides in that Member State, he accompanies or joins that Union citizen within the meaning of Article 3(1) of Directive 2004/38.

92 It makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family

members of that Union citizen, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State.

93 Therefore, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany … them' in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.

94 Application of Directive 2004/38 solely to the family members of a Union citizen who 'accompany' or 'join' him is thus equivalent to limiting the rights of entry and residence of family members of a Union citizen to the Member State in which that citizen resides.

95 From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of that directive.

96 Compliance with Article 27 is required in particular where the Member State wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.

97 However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate (see, to that effect, *MRAX*, paragraph 77 and the case-law cited).

98 Third, neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised.

99 The answer to the second question must therefore be that Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

The third question

100 In view of the answer to the second question, there is no need to answer the third question.

Costs

101 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.**

2. **Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.**

4. CJEU C-34/09, Ruiz Zambrano, 8 March 2011

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Citizenship of the Union – Article 20 TFEU – Grant of right of residence under European Union law to a minor child on the territory of the Member State of which that child is a national, irrespective of the previous exercise by him of his right of free movement in the territory of the Member States – Grant, in the same circumstances, of a derived right of residence, to an ascendant relative, a third country national, upon whom the minor child is dependent – Consequences of the right of residence of the minor child on the employment law requirements to be fulfilled by the third-country national ascendant relative of that minor)

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

Gerardo Ruiz Zambrano,

v

Office national de l'emploi (ONEm),

THE COURT (Grand Chamber),

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').

2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

Legal context

European Union law

3 Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

National law

The Belgian Nationality Code

4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings ('the Belgian Nationality Code'):

'Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.'

The Royal Decree of 25 November 1991

5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

…

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

…'

6 Article 43(1) of the Royal Decree states:

'Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

…'

7 Under Article 69(1) of the Royal Decree:

'In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.'

The Decree-Law of 28 December 1944

8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

'Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

…'

The Law of 30 April 1999

9 Article 4(1) of the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 21 May 1999, p. 17800) provides:

'An employer wishing to employ a foreign worker must obtain prior employment authorisation from the competent authority.

The employer may use the services of that worker only as provided for in that authorisation.

The King may provide for exceptions to the first paragraph herein, as He deems appropriate.'

10 Under Article 7 of that law:

'The King may, by a decree debated in the Council of Ministers, exempt such categories of foreign workers as He shall determine from the requirement to obtain a work permit.

Employers of foreign workers referred to in the preceding paragraph shall be exempted from the obligation to obtain a work permit.'

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

'The following shall not be required to obtain a work permit:

…

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;

(a) descendants under 21 years of age or dependants of the Belgian national or his spouse;

(b) dependent ascendants of the Belgian national or his/her spouse;

(c) the spouse of the persons referred to in (a) or (b);

…'

The Law of 15 December 1980

12 Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings ('the Law of 15 December 1980'), provides:

'In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.'

13 Article 40 of the same law provides:

'1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, "EC foreign national" shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there:

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.

16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.

18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognise Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the territory of the State of which he is a national.

22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.

23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.

25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.

26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.

27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working

immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.

29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.

30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.

31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating inter alia that he enjoys a right of residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a

minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

The questions referred for a preliminary ruling

36 By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.

37 All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.

39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to

grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

5. CJEU C-434/09, McCarthy, 5 May 2011

JUDGMENT OF THE COURT (Third Chamber)

5 May 2011 (*)

(Freedom of movement for persons – Article 21 TFEU – Directive 2004/38/EC – 'Beneficiary' – Article 3(1) – National who has never made use of his right of free movement and has always resided in the Member State of his nationality – Effect of being a national of another Member State – Purely internal situation)

In Case C-434/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom), made by decision of 5 May 2009, received at the Court on 5 November 2009, in the proceedings

Shirley McCarthy

v

Secretary of State for the Home Department,

THE COURT (Third Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) and Article 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

2 The reference was made in the course of proceedings between Mrs McCarthy and the Secretary of State for the Home Department ('the Secretary of State') concerning an application for a residence permit made by Mrs McCarthy.

Legal context

European Union law

3 According to recitals 1 to 3 in the preamble to Directive 2004/38:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.'

4 Chapter I of Directive 2004/38, entitled 'General provisions', comprises Articles 1 to 3 of the directive.

5 Article 1, entitled 'Subject', states:

'This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

6 Article 2 of Directive 2004/38, entitled 'Definitions', provides:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

7 Article 3 of Directive 2004/38, entitled 'Beneficiaries', provides in paragraph 1:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

8 Chapter III of that directive, entitled 'Right of residence', comprises Articles 6 to 15 of the directive.

9 Article 6 provides:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

10 Article 7 of Directive 2004/38 states:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.'

11 Under Chapter IV, headed 'Right of permanent residence', Article 16 of Directive 2004/38, entitled 'General rule for Union citizens and their family members', provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

…

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

12 Chapter V of that directive, entitled 'Provisions common to the right of residence and the right of permanent residence', includes Article 22 which, under the heading 'Territorial scope', provides:

'The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.'

National law

13 Under the United Kingdom Immigration Rules, nationals of third countries who do not have leave to remain in the United Kingdom thereunder also do not meet the requirements to be granted leave to remain under those Rules as the spouse of a person settled in the United Kingdom.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Mrs McCarthy, a national of the United Kingdom, is also an Irish national. She was born and has always lived in the United Kingdom, and has never argued that she is or has been a worker, self-employed person or self-sufficient person. She is in receipt of State benefits.

15 On 15 November 2002, Mrs McCarthy married a Jamaican national who lacks leave to remain in the United Kingdom under the Immigration Rules of that Member State.

16 Following her marriage, Mrs McCarthy applied for an Irish passport for the first time and obtained it.

17 On 23 July 2004, Mrs McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. The Secretary of State refused their applications on the

ground that Mrs McCarthy was not 'a qualified person' (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of 'a qualified person'.

18 Mrs McCarthy appealed against the decision that had been made in relation to her by the Secretary of State before the Asylum and Immigration Tribunal ('the Tribunal'), which dismissed the appeal on 17 October 2006. The High Court of Justice of England and Wales ordered the Tribunal to reconsider the appeal, and on 16 August 2007 the Tribunal upheld the decision to dismiss it.

19 The appeal brought by Mrs McCarthy against the decision of the Tribunal was dismissed by the Court of Appeal (Civil Division) (England and Wales). Mrs McCarthy brought an appeal against the decision of that court before the referring court.

20 For his part, Mr McCarthy did not appeal against the decision of the Secretary of State in relation to him, but nevertheless made a further application which was also refused. Mr McCarthy then appealed against that second decision to the Tribunal, which adjourned the appeal to await the final outcome of Mrs McCarthy's appeal.

21 In that context, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38 …?

2. Has such a person "resided legally" within the host Member State for the purpose of Article 16 of [that] directive in circumstances where she was unable to satisfy the requirements of Article 7 of [that directive]?'

Consideration of the questions referred

22 As is apparent from paragraphs 14 to 19 of this judgment, the main proceedings concern an application for a right of residence under European Union law brought by Mrs McCarthy, a Union citizen, to a Member State of which she is a national and where she has always resided.

23 That application is in fact intended to confer on Mr McCarthy, a national of a third country, a right of residence under Directive 2004/38, as a member of Mrs McCarthy's family, given that a comparable right of residence does not arise under the Immigration Rules of the United Kingdom.

The first question

24 At the outset, it should be noted that, even though, formally, the national court has limited its questions to the interpretation of Articles 3(1) and 16 of Directive 2004/38, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see Case C-251/06 *ING. AUER* [2007] ECR I-9689, paragraph 38 and the case-law cited).

25 There is no indication in the order for reference, in the case-file or in the observations submitted to the Court that Mrs McCarthy has ever exercised her right of free movement within the territory of the Member States, either individually or as a family member of a Union citizen who has exercised such a right. Likewise, Mrs McCarthy is applying for a right of residence under European Union law even though she does not argue that she is or has been a worker, self-employed person or self-sufficient person.

26 Thus, the first question from the national court must be understood as asking, in essence, whether Article 3(1) of Directive 2004/38 or Article 21 TFEU is applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

Preliminary observations

27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C-162/09 *Lassal* [2010] ECR I-0000, paragraph 29).

28 With regard to Directive 2004/38, the Court has already had occasion to point out that it aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and *Lassal*, paragraph 30).

29 Likewise, the Court has also held that a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason (see Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 22, and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, paragraph 81); that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional (see Cases C-370/90 *Singh* [1992] ECR I-4265, paragraph 22 and C-291/05 *Eind* [2007] ECR I-10719, paragraph 31).

The applicability of Directive 2004/38

30 The first part of the first question, as reformulated by the Court, concerns whether Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive applies to a citizen in a situation such as that of Mrs McCarthy, who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

31 A literal, teleological and contextual interpretation of that provision leads to a negative reply to that question.

32 First, according to Article 3(1) of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' than that of which they are a national are beneficiaries of that directive.

33 Secondly, whilst it is true that, as stated in paragraph 28 of this judgment, Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.

34 Since, as stated in paragraph 29 of this judgment, the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national.

35 Thirdly, it is apparent from Directive 2004/38, taken as a whole, that the residence to which it refers is linked to the exercise of the freedom of movement for persons.

36 Thus, first of all, Article 1(a) of that directive defines its subject by reference to the exercise of 'the' right 'of free movement and residence' within the territory of the Member States by Union citizens. Such a relationship between residence and free movement is also apparent both from the title of that directive and from the majority of its recitals, the second of which refers, moreover, exclusively to the free movement of persons.

37 Furthermore, the rights of residence referred to in Directive 2004/38, namely both the right of residence under Articles 6 and 7 and the permanent right of residence under Article 16, refer to the residence of a Union citizen either in 'another Member State' or in 'the host Member State' and therefore govern the legal situation of a Union citizen in a Member State of which he is not a national.

38 Lastly, although, as stated in paragraph 32 of this judgment, Article 3(1) of Directive 2004/38 designates as 'beneficiaries' of that directive all Union citizens who move to 'or' reside in a Member State, it is apparent from Article 22 that the territorial scope of the right of residence and the right of permanent residence referred to in that directive covers the whole territory of 'the host Member State', the latter being defined in Article 2(3) as the Member State to which a Union citizen 'moves' in order to exercise 'his/her' right of free movement and residence within the territory of the Member States.

39 Hence, in circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.

40 That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides.

41 Indeed, the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement.

42 Lastly, it should also be noted that, since a Union citizen such as Mrs McCarthy is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, her

spouse is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, in relation to instruments of European Union law prior to Directive 2004/38, Case C-243/91 *Taghavi* [1992] ECR I-4401, paragraph 7, and *Eind*, paragraph 23).

43 It follows that Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

The applicability of Article 21 TFEU

44 The second part of this question, as reformulated by the Court, concerns whether Article 21 TFEU is applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

45 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33, and *Metock and Others*, paragraph 77).

46 On this point, it must be observed, however, that the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22).

47 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, paragraph 41 and case-law cited). Furthermore, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

48 As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17 and case-law cited).

49 However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.

50 In that regard, by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom.

51 The case in the main proceedings also differs from Case C-148/02 *García Avello* [2003] ECR I-11613. In that judgment, the Court held that the application of the law of one Member State to nationals of that Member State who were also nationals of another Member State had the effect that those Union citizens had different surnames under the two legal systems concerned, and that that situation was liable to cause serious inconvenience for them at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals.

52 As the Court noted in Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, in circumstances such as those examined in *Garcia Avello*, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on

objective considerations and was proportionate to the legitimate aim pursued (see, to that effect, *Grunkin et Paul*, paragraphs 23, 24 and 29).

53 Thus, in *Ruiz Zambrano* and *García Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States.

54 As stated in paragraph 49 of the present judgment, in the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.

55 In those circumstances, the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State.

56 It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

57 In the light of the foregoing, the answer to the first question is as follows:

– Article 3(1) of Directive 2004/38 must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

– Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The second question

58 In view of the answer to the first question referred by the national court, there is no need to answer the second question.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.**

2. **Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the**

exercise of his right of free movement and residence within the territory of the Member States.

B. Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union

III. Voluntary Migration

A. Entry into the EU

1. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

2. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)

3. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

a) ECJ C-241/05, Bot, 3 October 2006

JUDGMENT OF THE COURT (Grand Chamber)

3 October 2006 (*)

(Convention implementing the Schengen Agreement – Article 20(1) – Conditions of movement of nationals of a third country not subject to a visa requirement – Maximum stay for a period of three months during the six months following the date of first entry into the Schengen Area – Successive stays – Definition of 'first entry')

In Case C-241/05,

REFERENCE for a preliminary ruling under Article 68 EC and Article 234 EC from the Conseil d'État (France), made by decision of 9 May 2005, received at the Court on 2 June 2005, in the proceedings

Nicolae Bot

v

Préfet du Val-de-Marne,

THE COURT (Grand Chamber),

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 20(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19) ('the CISA'), signed on 19 June 1990 at Schengen (Luxembourg).

2 This reference was made in the course of proceedings brought by Mr Bot, a Romanian national, for the annulment of the decree by the Préfet du Val-de-Marne (Prefect of Val-de-Marne) (France) ordering his deportation.

Legal context

The Schengen acquis

The Schengen Agreements

3 The Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (OJ 2000 L 239, p. 13) ('the Schengen Agreement') was implemented by the signature of the CISA.

4 Article 1 of the CISA defines 'alien' as 'any person other than a national of a Member State of the European Communities'.

5 Article 5(1), which appears under Title II of the CISA, entitled 'Abolition of checks at internal borders and movement of persons', lays down the conditions of entry of aliens into the territories of the Contracting States to the Schengen Agreement ('the Schengen Area') for stays not exceeding three months.

6 Chapter 3 of Title II of the CISA contains the rules concerning visas.

7 Article 11(1) of the CISA, which is in Section 1 of Chapter 3, entitled 'Short-stay visas', is worded as follows:

'1. The visa provided for in Article 10 may be:

(a) a travel visa valid for one or more entries, provided that neither the length of a continuous visit nor the total length of successive visits exceeds three months in any half-year, from the date of first entry;

…'

8 Article 18 of the CISA, which is in Section 2 of Chapter 3, entitled 'Long-stay visas', provides:

'Visas for stays exceeding three months shall be national visas issued by one of the Contracting Parties in accordance with its national law… '

9 Chapter 4 of Title II of the CISA sets out, in Articles 19 to 24 thereof, the conditions governing the movement of aliens. Inter alia, it provides the following:

'*Article 19*

1. Aliens who hold uniform visas and who have legally entered the territory of a Contracting Party may move freely within the territories of all the Contracting Parties during the period of validity of their visas, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

…

Article 20

1. Aliens not subject to a visa requirement may move freely within the territories of the Contracting Parties for a maximum period of three months during the six months following the date of first entry, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c), (d) and (e).

…

Article 23

1. Aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable within the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately.

…'

The Schengen Protocol

10 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community by the Treaty of Amsterdam ('the Schengen Protocol'), 13 Member States of the European Union, including the French Republic, were authorised to establish closer cooperation among themselves within the scope of the Schengen *acquis* as defined in the Annex to that protocol. That cooperation is to be conducted within the legal and institutional framework of the Union and of the EU and EC Treaties.

11 As stated in the Annex to the Schengen Protocol, the Schengen Agreement and the CISA are included in the Schengen *acquis* defined thereby.

12 Under the first subparagraph of Article 2(1) of the Schengen Protocol, from the date of entry into force of the Treaty of Amsterdam, that is to say as from 1 May 1999, the Schengen *acquis* is to apply immediately to the 13 Member States referred to in Article 1 of that protocol.

13 Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Schengen Protocol, the Council of the European Union adopted Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis (OJ 1999 L 176, p. 17). It is apparent from Article 2 of that decision, in conjunction with Annex A thereto, that the Council designated as the legal basis for Article 20 of the CISA Article 62(3) EC, which is part of Title IV of the EC Treaty, entitled 'Visas, asylum, immigration and other policies related to free movement of persons'.

Regulation (EC) No 539/2001

14 Under Article 1(2) of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), as amended by Council Regulation (EC) No 2414/2001 of 7 December 2001 (OJ 2001 L 327, p. 1), Romanian nationals are exempt from the requirement of having to be in possession of a visa when crossing Member States' external borders for stays of no more than three months in all.

National legislation

15 Regulation No 45-2658 of 2 November 1945 concerning the entry and residence requirements for aliens in France (*Journal officiel de la République française* (JORF), 4 November 1945, p. 7225), as amended by, inter alia, Law No 2003-1119 of 26 November 2003 concerning immigration management, the residence of aliens in France and nationality (JORF, 27 November 2003, p. 20136) ('Regulation No 45-2658'), provided as follows in Article 22:

'I – The State's representative in the Département and, in Paris, the chief of police may, by reasoned decree, decide that an alien is to be deported in the following instances:

(1) If the alien is unable to prove that he has lawfully entered French territory, unless he holds a valid residence permit;

…

II – The provisions of subparagraph 1 of I apply to an alien who is not a national of a Member State of the European Community:

(a) If he does not meet the entry requirements provided for in Article 5 of the [CISA];

(b) Or if, coming directly from the territory of a State which is a party to that Convention, he is unable to prove that he has entered the territory of metropolitan France in compliance with the provisions of Article 19(1) or (2), Article 20(1) and Article 21(1) or (2) of the [CISA].'

The main proceedings and the question referred for a preliminary ruling

16 It is apparent from the order for reference that Mr Bot, a Romanian national, resided in the Schengen Area, inter alia in France, from 15 August to 2 November 2002 and then from the end of November 2002 until the end of January 2003. Subsequently, passing through Hungary on 23 February 2003 and then, according to what he says, through Austria and Germany, he returned to France where he was stopped and questioned on 25 March 2003.

17 On 26 March 2003, a decree for his deportation was issued by the Préfet du Val-de-Marne on the basis of Article 22(II)(b) of Regulation No 45-2658.

18 The application for annulment of that decree made by Mr Bot was rejected by judgment of the Tribunal administratif de Melun (Administrative Court of Melun) of 1 April 2003 on the ground that, in essence, by returning to France even though the period of six months referred to in Article 20(1) of the CISA had not yet elapsed, Mr Bot had infringed that provision on several occasions and could not therefore be regarded as having proved that he had entered France lawfully for the purposes of that regulation.

19 On 5 May 2003, Mr Bot applied to the Conseil d'État (Council of State) to have that judgment set aside.

20 As it considered that the answer to the question whether, as at the date of the deportation decree, Mr Bot's position was lawful under Article 20(1) of the CISA depends on what is meant by 'date of first entry' for the purposes of that provision, the Conseil d'État decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'[What is] meant by "date of first entry" in terms of Article 20(1) of the [CISA] and, in particular, [should] any entry taking place at the end of a period of six months during which there has been no other entry into the territory, as well as, in the case of an alien who carries out multiple entries for stays of short duration, any entry immediately following the expiry of a period of six months from the date of the last known "first entry", be regarded as a "first entry" into the territory of the States which are party to that Convention[?]'

The question referred for a preliminary ruling

21 By its question, the national court seeks an interpretation of the term 'first entry' in Article 20(1) of the CISA in order to ascertain whether the right of a national of a third country not subject to a visa requirement to move freely within the Schengen Area, in accordance with that provision, for a maximum period of three months during a period of six months has been exhausted in the case of the applicant in the main proceedings.

22 It is apparent from the order for reference that the applicant, after having made successive stays in the Schengen Area amounting to more than three months in all during the six months following the date of his very first entry into that area, entered the area again after that initial six-month period had elapsed and was subject to a check there less than three months after that new entry.

23 In those circumstances, the national court raises the question whether the term 'first entry' refers to any new entry into the Schengen Area or solely, besides the very first entry into that territory, to the next entry made after the expiry of a period of six months from that very first entry.

24 As is apparent from the wording of Article 20(1) of the CISA, the date of first entry into the Schengen Area by a national of a third country not subject to a visa requirement is the point from which a period of six months starts to run during which such a national has the right, in accordance with that provision, to move freely within that area for a maximum period of three months.

25 It follows from this that, as observed by the national court, the very first entry of that national into the Schengen Area constitutes a first entry within the meaning of Article 20(1) of the CISA from which his right to stay for a maximum period of three months during a period of six months must be determined.

26 As all the interested parties who have submitted written observations to the Court have accepted, Article 20(1) of the CISA permits in that respect, in the same way as Article 11(1)(a) of the CISA does expressly as regards nationals of third countries subject to a visa requirement for stays of short duration, both a continuous visit of three months in length and successive visits of shorter length which, taken together, do not exceed three months in all.

27 However, it is apparent from the wording of Article 20(1) of the CISA, read in conjunction with Article 23(1) thereof, that when that right to stay for a maximum period of three months has been exhausted during the six-month period which has elapsed since the date of the very first entry into the Schengen Area, the national concerned must, as a rule, if his stay in that area is not to exceed that maximum period, leave it immediately.

28 Accordingly, whilst nothing in the wording of Article 20(1) of the CISA precludes the same national from moving within the Schengen Area again subsequently, a point which was, moreover, not disputed by any of the interested parties who submitted observations to the Court, it is on condition that he effect a new entry into that area and does so after the expiry of a period of six months following the date of his very first entry into the area.

29 As submitted by the French, Czech and Slovak Governments, such a new entry must therefore also be regarded as a first entry within the meaning of Article 20(1) of the CISA in the same way as the very first entry into the Schengen Area. That provision thus allows nationals of a third country not subject to a visa requirement to stay in that area for a maximum period of three months during successive periods of six months, provided that each of those periods commences with such a first entry.

30 That interpretation is borne out by the provisions of the CISA applicable to short-stay visas. Under Articles 11(1)(a) and 19 of that Convention, nationals of a third country who hold a travel visa and who have legally entered the Schengen Area may move freely within it for a period not exceeding three months in any half-year from the first entry, thus expressly allowing stays of three months during successive periods of six months.

31 It must also be pointed out that, as correctly submitted by the French and Czech Governments and likewise by the Commission of the European Communities, interpreted thus, the term 'first entry' in Article 20(1) of the CISA does not in any way deprive the competent national authorities of the power to penalise, in compliance with Community law, a national of a third country whose stay in the Schengen Area has exceeded the maximum period of three months during an earlier period of six months, even if, on the date of the check to which he was subject, his stay in that area, like that of Mr Bot in the main proceedings, has not exceeded three months since the most recent date of first entry.

32 The Commission, however, submits that this literal interpretation of Article 20(1) of the CISA is capable of resulting in unlawful behaviour intended to circumvent the rules applicable to long stays, although both Articles 62 EC and 63 EC and the provisions of the CISA, in particular Articles 5 and 18 thereof, set out a clear distinction between, firstly, stays exceeding a period of

three months, which are covered by the rules relating to immigration policy, and, secondly, stays of under three months, which are covered by the rules relating to the free movement of persons.

33 Thus, the Commission, and likewise the Finnish Government, observe that a national of a third country not subject to a visa requirement who, having taken care to leave the Schengen Area on the very day of his first entry, has effected a stay of three months less a day at the end of an initial period of six months, could, by leaving that area for a single day at the end of that initial period and entering it again the following day, stay in the area for three additional months during a second period of six months, thus allowing him to move freely within that territory for a period of six consecutive months less a day.

34 In those circumstances, the Commission and the Finnish Government submit that Article 20(1) of the CISA should, in accordance with the objectives of that Convention, be interpreted in such a way as to ensure that any national of a third country contemplating one or more successive stays exceeding in total the maximum period of three months during any six-month period is subject to the rules laid down by the Community legislation relating to long stays.

35 According to the Commission, the term 'first entry' is therefore to be interpreted as relating to any first entry into the Schengen Area and also to any new entry provided that a period of more than three months without a stay in that area has elapsed between the last exit and that new entry. If that is not the case, a distinction must be drawn according to whether the length of the stay during the six-month period preceding that new entry is more or less than three months. In the former case, the right to stay would be exhausted. In the latter case, the right to stay would have to be calculated by reference to the length of the stays aggregated over the six-month period.

36 As for the Finnish Government, it submits that the term 'first entry' is to be interpreted as referring to the first entry into the Schengen Area which took place during the six-month period preceding a new entry into that area, with every stay which has already been made in the area during that period reducing the length of the permitted three-month stay accordingly.

37 It is indeed apparent from the wording of Article 62(3) EC, which, pursuant to Decision 1999/436, constitutes the legal basis for Article 20(1) of the CISA, that the Council can adopt on the basis of that provision of the EC Treaty only measures setting out the conditions under which nationals of third countries may move freely within the Schengen Area during a period of no more than three months.

38 It follows from this that, regardless of compliance with the requirement as to the period of six months following the date of first entry in Article 20(1) of the CISA, nationals of a third country cannot in any event stay in the Schengen Area pursuant to that provision for more than three consecutive months in all. As regards nationals of a third country not subject to a visa requirement, that absolute maximum limit is clear from Article 5(1) of the CISA and Article 1(2) of Regulation No 539/2001.

39 That being so, contrary to what the Commission and the Finnish Government suggest, the interpretation of the term 'first entry' in Article 20(1) of the CISA, as is apparent from paragraphs 28 and 29 of this judgment, does not in any way have the effect of permitting nationals of a third country not subject to a visa requirement to move freely within the Schengen Area for a period of more than three consecutive months, since, as has been stated in those paragraphs, every 'first entry' within the meaning of that provision necessarily calls for a new entry into that area after a prior period of six months has elapsed.

40 Furthermore, although according to the interpretations advocated by the Commission and the Finnish Government the term 'first entry' is essentially capable of ensuring that a national of a third country not subject to a visa requirement does not stay for more than three months in the Schengen Area during any period of six months, that is clearly not the rule laid down by Article 20(1) of the CISA, which merely prohibits stays of more than three months during the six months beginning on a date corresponding to the first entry into that area. By focusing on the variable dates of first entry depending on the date of last entry, those interpretations effectively overlook the fact that Article 20(1) of the CISA is framed around the very notion of 'first entry', in order to replace it with date of last entry, which is not to be found in that provision.

41 In those circumstances, as they have no basis in the wording of that provision, those interpretations, the relative complexity of which could, moreover, affect the uniform application of Article 20(1) of the CISA and therefore prejudice legal certainty for individuals, cannot be accepted.

42 As for the risk of circumvention of the rules applicable to long stays, as submitted by the Commission, it is sufficient to point out that while Article 20(1) of the CISA allows, as its wording now stands, a national of a third country not subject to a visa requirement to stay in the Schengen Area for a period of almost six months by aggregating two successive non-consecutive stays, it is for the Community legislature to amend that provision, if necessary, if it takes the view that such an aggregation is capable of undermining the rules applicable to stays of more than three months.

43 Consequently, the answer to the question referred for a preliminary ruling must be that Article 20(1) of the CISA is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the Schengen Area, to the first entry into that area taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court hereby rules:

Article 20(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen, is to be interpreted as meaning that the term 'first entry' in that provision refers, besides the very first entry into the territories of the Contracting States to that agreement, to the first entry into those territories taking place after the expiry of a period of six months from that very first entry and also to any other first entry taking place after the expiry of any new period of six months following an earlier date of first entry.

b) ECJ C-261/08 and 348/08, Zurita Garcia et al., 22 October 2009

JUDGMENT OF THE COURT (Third Chamber)

22 October 2009 (*)

(Visas, asylum and immigration – Measures concerning the crossing of external borders – Article 62(1) and (2)(a) EC – Convention implementing the Schengen Agreement – Articles 6b and 23 – Regulation (EC) No 562/2006 – Articles 5, 11 and 13 – Presumption concerning the duration of the stay – Unlawful presence of third-country nationals on the territory of a Member State – National legislation allowing for either a fine or expulsion, depending on the circumstances)

In Joined Cases C-261/08 and C-348/08,

REFERENCES for preliminary rulings under Articles 68 EC and 234 EC from the Tribunal Superior de Justicia de Murcia (Spain), made by decisions of 12 June and 22 July 2008, received at the Court on 19 June and 30 July 2008 respectively, in the proceedings

María Julia Zurita García (C-261/08),

Aurelio Choque Cabrera (C-348/08)

v

Delegado del Gobierno en la Región de Murcia,

THE COURT (Third Chamber),

gives the following

Judgment

1 The present references for preliminary rulings concern the interpretation of Article 62(1) and (2)(a) EC, and Articles 5, 11 and 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

2 The references have been made in the course of two actions brought by Bolivian nationals, namely Ms Zurita García (Case C-261/08) and Mr Choque Cabrera (Case C-348/08), against the Delegado del Gobierno en la Región de Murcia (government representative for the region of Murcia; 'the Delgado del Gobierno') relating to orders for expulsion from Spanish territory, with a prohibition on entry into the Schengen area for five years, adopted against Ms Zurita García and Mr Choque Cabrera.

Legal context

Community legislation

The Schengen Protocol

3 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam ('the Protocol'), 13 Member States of the European Union are authorised to establish closer cooperation among themselves within the scope of the Schengen *acquis*, as defined in the annex to that protocol. That cooperation is conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community.

4 Under the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam, that is to say, from 1 May 1999, the Schengen *acquis* was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

5 Both the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (OJ 2000 L 239, p. 13), and the Convention implementing the Schengen Agreement, signed at Schengen on 19 June 1990 (OJ 2000 L 239, p. 19), as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to this end (OJ 2004 L 369, p. 5) ('the CISA'), form part of that *acquis*.

6 Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council of the European Union adopted, on 20 May 1999, Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17). It follows from Article 2 of Decision 1999/436, in conjunction with Annex A thereto, that the Council selected Articles 62 EC and 63 EC, which form part of Title IV of the EC Treaty, entitled 'Visas, asylum, immigration and other policies related to free movement of persons', as the legal bases for Article 23 of the CISA.

The CISA

7 Article 6b of the CISA provides:

'1. If the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

2. This presumption may be rebutted where the third-country national provides, by any means, credible evidence such as transport tickets or proof of his or her presence outside the territory of the Member States, which shows that he or she has respected the conditions relating to the duration of a short stay.

...

3. Should the presumption referred to in paragraph 1 not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.'

8 Article 23 of the CISA states:

'1. Aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable within the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately.

...

3. Where such aliens have not left voluntarily or where it may be assumed that they will not do so or where their immediate departure is required for reasons of national security or public policy, they must be expelled from the territory of the Contracting Party in which they were apprehended, in accordance with the national law of that Contracting Party. If under that law expulsion is not authorised, the Contracting Party concerned may allow the persons concerned to remain within its territory.

...

5. Paragraph 4 shall not preclude the application of national provisions on the right of asylum, the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the

New York Protocol of 31 January 1967, paragraph 2 of this Article or Article 33(1) of this Convention.'

Regulation No 562/2006

9 Regulation No 562/2006 codifies the existing texts on border controls and seeks to consolidate and develop the legislative aspect of the policy of integrated management of borders by detailing rules on the crossing of external borders.

10 Under Article 5 of that regulation, relating to entry conditions for third-country nationals:

'1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document or documents authorising them to cross the border;

(b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81, p. 1], except where they hold a valid residence permit;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the [Schengen Information System] for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purposes of refusing entry on the same grounds.

…'

11 The wording of Article 11(1) and (3) of Regulation No 562/2006, concerning the presumption as regards fulfilment of conditions of duration of stay, adopted that of Article 6b(1) and (3) of the CISA, except in the Spanish-language version, which provides as follows in Article 11(3) of the regulation:

'Should the presumption referred to in paragraph 1 not be rebutted, the competent authorities shall expel the third-country national from the territories of the Member States concerned.'

12 Article 13 of Regulation No 562/2006, concerning the refusal of entry, states:

'1. A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

…'

13 Under Article 39(1) of that regulation, Articles 2 to 8 of the CISA were repealed with effect from 13 October 2006.

14 Pursuant to its Article 40, Regulation No 562/2006 entered into force on 13 October 2006.

National legislation

15 Framework Law 4/2000 on the rights and freedoms of aliens in Spain and their social integration (Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139) was amended by Framework Law 8/2000 of 22 December 2000 (BOE No 307 of 23 December 2000, p. 45508), and by Framework Law 14/2003 of 20 November 2003 (BOE No 279 of 21 November 2003, p. 41193) ('the Law on Aliens').

16 Article 28(3) of the Law on Aliens, which governs the departure of aliens from Spain, provides:

'Departure [from Spanish territory] is obligatory in the following situations:

...

(c) in the event of administrative refusal of applications to remain on Spanish territory submitted by an alien, or in the absence of authorisation to be in Spain.'

17 Pursuant to Article 51 of the Law on Aliens, offences under the provisions relating to the entry and stay of aliens are classified according to their gravity as 'less serious', 'serious' and 'very serious'.

18 Article 53(a) of that law defines a serious offence as:

'Being unlawfully present on Spanish territory, on the ground that the person concerned has not obtained an extension of permission to stay or a residence permit, or on the ground that these have expired more than three months previously, and that person has not applied for renewal of that permission to stay or residence permit within the period laid down by law.'

19 Under Article 55 of the Law on Aliens, the penalty for a serious offence is a maximum fine of EUR 6 000. When imposing the penalty, the competent authority must apply criteria of proportionality, taking into account the degree of culpability, the damage caused, and the risk arising from the offence and its repercussions.

20 Article 57 of the Law on Aliens, concerning expulsion from the territory, provides:

'1. If the offender is a foreign national and behaves in a manner defined by law as very serious, or serious, within the meaning of Article 53(a), (b), (c), (d) and (f) of this Framework Law, it is possible, instead of imposing a fine, to expel that person from Spanish territory, at the conclusion of the corresponding administrative procedure.

2. Where the alien has been found guilty, in Spain or abroad, of intentional conduct which constitutes a criminal offence in Spain punishable by a prison sentence of longer than one year, that shall constitute a further legal basis for expulsion at the end of the corresponding administrative procedure, save where the previous conviction has been removed from the criminal record.

3. Under no circumstances may the penalties of expulsion and a fine be imposed together.

...'

21 Article 158 of Royal Decree 2393/2004, which adopted rules for the implementation of the Law on Aliens (Reglamento de la Ley de Extranjería) of 30 December 2004 (BOE No 6 of 7 January 2005, p. 485), provides:

'1. In the absence of authorisation to be in Spain, inter alia, because the conditions for entry or residence are not met, or are no longer met, or in the event of an administrative refusal of an application for permission to stay, a residence permit or any other documentation necessary so that the alien may remain on Spanish territory … the administrative decision shall inform the person concerned of the obligation on him to leave the country, without prejudice to the possibility of that warning also being indicated on his passport or similar document, or even being indicated on a separate document if the person concerned is present in Spain on the basis of an identification document which does not allow for a suitable statement to be inserted.

...

2. The compulsory departure must take place within the period prescribed by the decision refusing the request or, if appropriate and at the latest, within 15 days of the notification of the decision of refusal, save for exceptional circumstances and where the person concerned is able to prove that he has sufficient means of subsistence; in such a situation, the period may be extended by 90 days at most. If the period expires and the departure has not taken place, the provisions laid down in the present rules for the cases referred to in Article 53(a) of the Law [on Aliens] shall be applied.

3. If the aliens to whom the present article refers in fact leave Spanish territory in accordance with the provisions of the foregoing paragraphs, they shall not be prohibited from entering the country and they may return to Spain, on condition that they comply with the rules governing access to Spanish territory.

...'

22 It is apparent from the orders for reference that the abovementioned national provisions are interpreted by the Tribunal Supremo (Supreme Court) as meaning that, since expulsion is a criminal penalty, the decision which imposes it must be specifically reasoned and must comply with the principle of proportionality.

23 It is apparent from the files before the Court that, in practice, where a third-country national does not have the right to enter or remain in Spain and his conduct has not given rise to aggravating circumstances, the penalty imposed is to be restricted to a fine, except where there is an additional factor which would justify replacing the fine with expulsion.

The disputes in the main proceedings and the question referred for preliminary ruling

24 In Case C-261/08, on 26 September 2006, the competent authorities initiated an administrative procedure for infringement of Article 53(a) of the Law on Aliens against Ms Zurita García, a Bolivian national who was unlawfully present in Spain, either on the ground that she had not obtained an extension of her permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and she had not sought to have them renewed.

25 That procedure led, on 15 November 2006, to the adoption of a decision by the Delgado del Gobierno announcing that Ms Zurita García was to be expelled from Spanish territory. That penalty was accompanied by a prohibition on entry to the Schengen area for a period of five years.

26 Ms Zurita García challenged that decision before the Juzgado de lo Contencioso-Administrativo nº 6 de Murcia (Court for Contentious Administrative Proceedings No 6 of Murcia), which rejected the action at first instance. On appeal, Ms Zurita García claimed that that decision should be quashed because the administration had not correctly applied the principle of proportionality when assessing the circumstances of the case, which in no way justified the replacement of a fine by expulsion.

27 In Case C-348/08, by decision of 30 July 2007, the Delgado del Gobierno ordered the expulsion from Spanish territory of Mr Choque Cabrera, a Bolivian national who was unlawfully in Spain, within the meaning of Article 53(a) of the Law on Aliens, either on the ground that he had not obtained an extension of his permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and he had not sought to have them renewed. That penalty was accompanied with a prohibition on entry to the Schengen area for a period of five years.

28 Mr Choque Cabrera challenged that decision before the Juzgado de lo Contencioso-Administrativo nº 4 de Murcia (Court for Contentious Administrative Proceedings No 4 of Murcia), which rejected the action at first instance. On appeal, Mr Choque Cabrera claimed that that decision should be quashed because the administration had not applied the principle of proportionality when assessing the circumstances of the case, and did not give reasons for replacing a fine with expulsion.

29 In those circumstances, the Tribunal Superior de Justicia de Murcia (High Court of Justice of Murcia) decided to stay both actions before it and to refer the following question, worded identically in each case, to the Court for a preliminary ruling:

'Should Article 62(1) and (2)(a) of the Treaty establishing the European Community and Articles 5, 11 and 13 of Regulation (EC) No 562/2006 … be interpreted as precluding national legislation, and the case-law which interprets it, which permits the substitution of the expulsion of any "third-country national" who does not have documentation authorising him to enter and remain in the territory of the European Union by imposition of a fine?'

30 By order of the President of the Third Chamber of 27 March 2009, Cases C-261/08 and C-348/08 were joined for the purposes of the oral procedure and of judgment.

The question referred for a preliminary ruling

Admissibility of the question referred in Case C-261/08

31 The Spanish Government submits that the question referred in Case C-261/08 is inadmissible on the ground that it is purely hypothetical.

32 It claims that the principle of non-retroactivity in criminal law precludes the application *ratione temporis* of the obligation, which may be laid down in Article 11(3) of Regulation No 562/2006, to penalise the facts of the case in the main proceedings by expulsion, inasmuch as that regulation entered into force only on 13 October 2006, whereas the appellant in the main proceedings had already been accused of being unlawfully present on Spanish territory on 26 September 2006.

33 In the Spanish Government's view, as the case in the main proceedings concerns an administrative penalty, to which the same principles apply as those which apply to criminal proceedings, in particular the principle of legality and that of incrimination, the applicable legislation should be that which was in force on the date of the facts alleged, and not that which was applicable on the date on which the expulsion decision was taken by the national authorities, namely 15 November 2006, a position which the referring court appears to share.

34 In that regard, it should be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the ultimate judicial decision, to determine in the light of the particular circumstances of the

case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19; and Case C-537/07 *Gómez-Limón* [2009] ECR I-0000, paragraph 24).

35 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and *Gómez-Limón*, paragraph 25).

36 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (*Foglia*, paragraphs 18 and 20; Case 149/82 *Robards* [1983] ECR 171, paragraph 19; and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25).

37 In the present context, it must be held that, on the date on which the appellant in the main proceedings in Case C-261/08 was officially accused of being unlawfully present on Spanish territory, namely 26 September 2006, Regulation No 562/2006 had not yet entered into force, with the result that the issue as to whether that regulation needs to be interpreted may arise in relation to the facts giving rise to that case.

38 It is Article 6b of the CISA, and not Article 11(3) of Regulation No 562/2006, which will be applicable if the date of the facts were to be the criterion for determining the law applicable *ratione temporis* in Case C-261/08. Article 6b of the CISA is among those provisions which were repealed under Article 39 of Regulation No 562/2006 with effect from 13 October 2006.

39 In any event, however, as the Advocate General notes in point 27 of her Opinion, Article 11(3) of Regulation No 562/2006 merely repeats the wording of Article 6b(3) of the CISA, which was in force when the appellant in the main proceedings was officially accused of being unlawfully present on Spanish territory.

40 Moreover, it should be pointed out that the referring court has submitted a question for a preliminary ruling to the Court with the same wording, in the course of the proceedings giving rise to the case which is joined to Case C-261/08, that is to say, Case C-348/08, the facts of which occurred when Regulation No 562/2006 was already in force.

41 Therefore, the question referred in each of the two joined cases must be held to be admissible.

Substance

42 At the outset, it should be pointed out that the request for interpretation concerns Article 62(1) and (2)(a) EC, and Articles 5, 11 and 13 of Regulation No 562/2006.

43 It must be specified, firstly, that Article 62(1) and (2)(a) EC constitutes the legal basis for the Council's action with a view to the adoption of measures ensuring the absence of any checks on persons when crossing internal borders, and measures on the crossing of the external borders of the Member States, and does not have the objective, in and of itself, of granting rights to third-country nationals, or of imposing obligations on Member States.

44 Next, Article 5 of Regulation No 562/2006 establishes the entry conditions for third-country nationals when they cross an external border for stays not exceeding three months per six-month period, while Article 13 of that regulation concerns the refusal of entry, to the territory of the Member States, to third-country nationals who do not fulfil all of those conditions.

45 Consequently, Articles 5 and 13 of Regulation No 562/2006 likewise do not govern the situation of third-country nationals, such as Ms Zurita García and Mr Choque Cabrera, who were already on Spanish territory, since an unspecified date, when the expulsion order was made against them on grounds of their unlawful stay.

46 Lastly, having regard to the fact that it cannot be ruled out that Articles 6b and 23 of the CISA may be applicable, *ratione temporis*, in Case C-261/08 (see paragraphs 37 and 38 of this judgment), as the Austrian Government and the Commission of the European Communities suggest, it is appropriate to take those articles of the CISA into account when examining the question referred for a preliminary ruling in order to provide the referring court with an answer

which will be of use to it (see, by analogy, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 46, and Case C-346/06 *Rüffert* [2008] ECR I-1989, paragraph 18).

47 As is clear from its wording, Article 23 of the CISA applies to all those who are not nationals of a Member State and who do not fulfil, or no longer fulfil, the short-stay conditions applicable within the territory of one of the Member States, which, according to the factual account given in the orders for reference, would appear to be the situation of both Ms Zurita García and Mr Choque Cabrera.

48 It follows that, by its question, the referring court is asking, in essence, whether Articles 6b and 23 of the CISA and Article 11 of Regulation No 562/2006 must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the short-stay conditions applicable in that Member State, that Member State is obliged to adopt a decision to expel that person.

49 Both Article 6b(1) of the CISA and Article 11(1) of Regulation No 562/2006 establish a rebuttable presumption under which, if the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

50 Article 6b(2) of the CISA, like Article 11(2) of Regulation No 562/2006, allows for that presumption to be rebutted where the third-country national provides, by any means, credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States, that he or she has respected the conditions relating to the duration of a short stay.

51 Pursuant to Article 6b(3) of the CISA and Article 11(3) of Regulation No 562/2006, should the presumption referred to in paragraph 1 of both of those articles not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.

52 The Commission points out, correctly, that there is a discrepancy between the wording of the Spanish-language version of Article 11(3) of Regulation No 562/2006 and that of the other language versions.

53 In the Spanish-language version, that provision imposes an obligation, inasmuch as it provides that the competent authorities of the Member State 'shall expel', from the territory of that Member State, a third-country national if the presumption is not rebutted. By contrast, in all the other language versions, expulsion appears as an option for those authorities.

54 It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages (see, inter alia, Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel Import und Export* [1988] ECR 3845, paragraph 15; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47; and Case C-188/03 *Junk* [2005] ECR I-885, paragraph 33).

55 It also follows from settled case-law that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of Community law (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 23; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraph 38).

56 In the present cases, as the Spanish-language version of Article 11(3) of Regulation No 562/2006 is the only one which diverges from the wording of the other language versions, it must be concluded that the real intention of the legislature was not to impose an obligation on the Member States concerned to expel, from their territory, third-country nationals in the event that they have not succeeded in rebutting the presumption referred to in Article 11(1), but to grant those Member States the option of so doing.

57 That interpretation is confirmed, as the Advocate General states in point 43 of her Opinion, by the fact that the Spanish-language version of Article 6b of the CISA, the wording of which was repeated in Article 11 of Regulation No 562/2006, accords with the other language versions as regards the discretionary nature of the power, for the Member States concerned, to expel a third-country national who does not succeed in rebutting the abovementioned presumption.

58 It remains to be examined whether, as the Austrian Government claims, it follows from Article 23 of the CISA that the Member States must expel from their territory any third-country national who is unlawfully present there, unless there is a reason to grant that person asylum or

international protection. That provision would then preclude the option for a Member State to replace an expulsion order with the imposition of a fine.

59 That interpretation of Article 23 of the CISA cannot be upheld.

60 It should be pointed out, in that regard, that the wording of Article 23 of the CISA does not mention an obligation to expel in such strict terms, in the light of the exceptions therein.

61 First, Article 23(1), which forms part of Chapter 4, concerning the conditions governing the movement of aliens, under Title II on the abolition of checks at internal borders and movement of persons, favours the voluntary departure of a third-country national who does not fulfil, or no longer fulfils, the short-stay conditions applicable within the territory of the Member State concerned.

62 The same applies for Article 23(2), according to which a third-country national who holds a valid residence permit or provisional residence permit issued by another Member State is required to go to the territory of that Member State immediately.

63 Second, to the extent to which Article 23(3) of the CISA provides that, in certain circumstances, a third-country national must be expelled from a Member State on the territory of which he was apprehended, that consequence is subordinate to the conditions laid down in the national law of the Member State concerned. In the event that the application of that national law does not permit expulsion, that Member State may allow the person concerned to remain on its territory.

64 It is thus for the national law of each Member State to adopt, particularly with regard to the conditions under which expulsion may take place, the means for applying the basic rules established in Article 23 of the CISA relating to third-country nationals who do not fulfil, or no longer fulfil, the short-stay conditions for its territory.

65 In the cases in the main proceedings, it is apparent from the information provided to the Court in the course of the written procedure that, under national law, a decision imposing a fine is not a permit for a third-country national who is unlawfully present in Spain to remain legally on Spanish territory. It is also apparent that, irrespective of whether that fine is paid or not, that decision is notified to the person concerned with a warning that he should leave the territory within 15 days and, that, should he fail to comply, he may be prosecuted under Article 53(a) of the Law on Aliens and risks being expelled with immediate effect.

66 Consequently, the reply to the question referred is that Articles 6b and 23 of the CISA and Article 11 of Regulation No 562/2006 must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 6b and 23 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990, as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to this end, and Article 11 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person.

c) CJEU C-188/10 and C-189/10, Melki and Abdeli, 22 June 2010

JUDGMENT OF THE COURT (Grand Chamber)

22 June 2010 (*)

(Reference for a preliminary ruling – Article 267 TFEU – Examination of whether a national law is consistent both with European Union law and with the national constitution – National legislation granting priority to an interlocutory procedure for the review of constitutionality – Article 67 TFEU – Freedom of movement for persons – Abolition of border control at internal borders – Regulation (EC) No 562/2006 – Articles 20 and 21 – National legislation authorising identity checks in the area between the land border of France with States party to the Convention Implementing the Schengen Agreement and a line drawn 20 kilometres inside that border)

In Joined Cases C-188/10 and C-189/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decisions of 16 April 2010, received at the Court on the same day, in proceedings against

Aziz Melki (C-188/10),

Sélim Abdeli (C-189/10),

THE COURT (Grand Chamber),

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 67 TFEU and 267 TFEU.

2 The references have been made in the course of two sets of proceedings brought against Mr Melki and Mr Abdeli respectively – both of whom are of Algerian nationality – seeking the extension of their detention in premises not falling within the control of the prison service.

Legal context

European Union law

3 Under the preamble to Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290; 'Protocol No 19'):

'The High Contracting Parties,

noting that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, have been integrated into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997,

desiring to preserve the Schengen *acquis*, as developed since the entry into force of the Treaty of Amsterdam, and to develop this *acquis* in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders,

…

have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union'.

4 Article 2 of that protocol states:

'The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.'

5 The Schengen *acquis* comprises, inter alia, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen (Luxembourg) on 19 June 1990 ('the CISA'), Article 2 of which concerned the crossing of internal borders.

6 Under Article 2(1) to (3) of the CISA:

‘1. Internal borders may be crossed at any point without any checks on persons being carried out.

2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

3. The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party’s territory by the competent authorities under that Party’s law, or the requirement to hold, carry and produce permits and documents provided for in that Party’s law.’

7 Article 2 of the CISA was repealed as from 13 October 2006, in accordance with Article 39(1) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

8 Under Article 2, points 9 to 11, of that regulation:

‘For the purposes of this Regulation the following definitions shall apply:

…

9. “border control”, means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;

10. “border checks”, means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;

11. “border surveillance”, means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks’.

9 Article 20 of Regulation No 562/2006, entitled ‘Crossing internal borders’, provides:

‘Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.’

10 Article 21 of that regulation, entitled ‘Checks within the territory’, provides:

‘The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective;

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;

(iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;

(iv) are carried out on the basis of spot-checks;

…

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

…’

National law

Constitution of 4 October 1958

11 Article 61-1 of the Constitution of 4 October 1958, as amended by Constitutional Law No 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic (JORF of 24 July 2008, p. 11890) (‘the Constitution’), provides:

'If, in the course of proceedings before a court or tribunal, it is claimed that a legislative provision prejudices the rights and freedoms which the Constitution guarantees, the matter may be brought before the Conseil constitutionnel [Constitutional Council] further to a reference from the Conseil d'État [Council of State] or the Cour de Cassation [Court of Cassation], which shall rule within a fixed period.

An Organic Law shall determine the conditions for implementing the present article.'

12 The second and third paragraphs of Article 62 of the Constitution provide:

'A provision declared unconstitutional on the basis of Article 61-1 shall be repealed as of the publication of the decision of the Conseil constitutionnel or as of a subsequent date determined by that decision. The Conseil constitutionnel shall determine the conditions and limits within which the effects produced by the provision may be affected.

No appeal shall lie from the decisions of the Conseil constitutionnel. They shall be binding on public authorities and on all administrative authorities and courts.'

13 Under Article 88-1 of the Constitution:

'The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common pursuant to the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.'

Order No 58-1067

14 Organic Law No 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution (JORF of 11 December 2009, p. 21379) inserted a new Chapter IIa, entitled 'Priority Questions on Constitutionality', into Title II of Order No 58-1067 of 7 November 1958 on the organic law governing the Conseil constitutionnel. That Chapter IIa provides:

'Section 1

Provisions applicable before the courts and tribunals subject to the authority of the Conseil d'État or the Cour de cassation

Article 23-1

Before the courts and tribunals subject to the authority of the Conseil d'État or the Cour de cassation, a plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. Such a plea may be raised for the first time in appeal proceedings. A court or tribunal may not raise the issue of its own motion.

…

Article 23-2

The court or tribunal shall rule without delay, by way of reasoned decision, on whether to submit the priority question on constitutionality to the Conseil d'État or the Cour de cassation. The question shall be so submitted if the following conditions are met:

1. The contested provision is applicable to the dispute or to the proceedings, or forms the basis of the action;

2. It has not already been declared constitutional in the grounds or the operative part of a decision of the Conseil constitutionnel, except where there has been a change in circumstances;

3. The question is not devoid of substance.

In any event, where pleas are made before the court or tribunal challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on whether to submit the question on constitutionality to the Conseil d'État or the Cour de cassation.

The decision to submit the question shall be sent to the Conseil d'État or to the Cour de cassation within eight days of its being made, together with the pleadings or the submissions of the parties. It shall not be open to appeal. A refusal to submit the question may be challenged only at the time of an appeal against the decision disposing of all or part of the case.

Article 23-3

Where the question is submitted, the court or tribunal shall stay proceedings until receipt of the decision of the Conseil d'État or the Cour de cassation or, if the matter has been referred to it, of the Conseil constitutionnel. The preparatory inquiries shall not be suspended and the court or tribunal may take the necessary interim or protective measures.

However, proceedings shall not be stayed either where a person is deprived of his liberty by reason of the proceedings, or where the purpose of the proceedings is to bring to an end a measure depriving someone of his liberty.

The court or tribunal may also rule without awaiting the decision on the priority question on constitutionality if law or regulation provides that it is to rule within a fixed period or as a matter of urgency. If the court at first instance rules without waiting and an appeal is brought against its decision, the appeal court shall stay proceedings. It may, however, not stay the proceedings if it is itself required to rule within a fixed period or as a matter of urgency.

In addition, where a stay of proceedings would risk leading to irreparable or manifestly excessive consequences for the rights of a party, the court or tribunal which decides to submit the question may rule on those points which must be decided immediately.

If an appeal on a point of law has been brought where the courts adjudicating on the substance have ruled without awaiting the decision of the Conseil d'État or the Cour de cassation or, if the matter has been referred to it, the decision of the Conseil constitutionnel, any decision on that appeal shall be stayed until a ruling has been given on the priority question on constitutionality. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de cassation is to rule within a fixed period.'

Section 2

Provisions applicable before the Conseil d'État and the Cour de cassation

Article 23-4

Within a period of three months from receipt of the submission provided for in Article 23-2 or in the last paragraph of Article 23-1, the Conseil d'État or the Cour de cassation shall rule on whether to refer the priority question on constitutionality to the Conseil constitutionnel. A reference shall be made where the conditions laid down in Article 23-2(1) and (2) are met and where the question is new or of substance.

Article 23-5

A plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution may be raised, including for the first time on appeal on a point of law, in proceedings before the Conseil d'État or the Cour de cassation. The plea shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. The court may not raise the issue of its own motion.

In any event, where pleas are made before the Conseil d'État or the Cour de cassation challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel.

The Conseil d'État or the Cour de cassation shall have a period of three months from the date on which the plea is submitted to deliver its decision. The priority question on constitutionality shall be referred to the Conseil constitutionnel where the conditions laid down in Article 23-2(1) and (2) are met and the question is new or of substance.

Where a reference has been made to the Conseil constitutionnel, the Conseil d'État or the Cour de cassation shall stay proceedings until it has made its ruling. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de Cassation is to rule within a fixed period. If the Conseil d'État or the Cour de cassation is required to rule as a matter of urgency, it is possible for the proceedings not to be stayed.

…

Article 23-7

The reasoned decision of the Conseil d'État or the Cour de cassation to refer the matter to the Conseil constitutionnel shall be sent to it together with the pleadings or submissions of the parties. The Conseil constitutionnel shall receive a copy of any reasoned decision of the Conseil d'État or the Cour de cassation not to refer a priority question on constitutionality to it. If the Conseil d'État or the Cour de cassation has not ruled within the periods prescribed in Articles 23-4 and 23-5, the question is submitted to the Conseil constitutionnel.

…

Section 3

Provisions applicable before the Conseil constitutionnel

[…]

Article 23-10

The Conseil constitutionnel shall issue a ruling within three months of the date on which the matter was referred to it. The parties shall be permitted to submit their observations in adversarial proceedings. The hearing shall be public, save in exceptional cases defined in the Rules of Procedure of the Conseil constitutionnel.

…'

The Code of Criminal Procedure

15 Article 78-2 of the Code of Criminal Procedure (code de procédure pénale), in the version in force at the material time, provides:

'Senior police officers and, upon their orders and under their responsibility, the police officers and assistant police officers referred to in Articles 20 and 21-1 may ask any person to prove his identity by any means, where one or more plausible reasons exist for suspecting that:

– the person has committed or attempted to commit an offence;

– or the person is preparing to commit a "crime" [most serious criminal offence] or a "délit" [less serious offence];

– or the person is likely to provide information useful for the investigation in the event of a "crime" or a "délit";

– or the person is the subject of inquiries ordered by a judicial authority.

On the public prosecutor's written recommendations for the purposes of the investigation and prosecution of offences specified by him, the identity of any person may also be checked, in accordance with the same rules, in the places and for a period of time determined by the public prosecutor. The fact that the identity check uncovers offences other than those referred to in the public prosecutor's recommendations shall not constitute a ground for invalidating the related proceedings.

The identity of any person, regardless of his behaviour, may also be checked pursuant to the rules set out in the first paragraph, to prevent a breach of public order, in particular, an offence against the safety of persons or property.

In an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order. The fact that the identity check reveals an offence other than the non-observance of the aforementioned obligations shall not constitute a ground for invalidating the related proceedings.

…'

The actions in the main proceedings and the questions referred for a preliminary ruling

16 Mr Melki and Mr Abdeli, Algerian nationals unlawfully present in France, were subject to a police control, pursuant to Article 78-2, fourth paragraph, of the Code of Criminal Procedure, in the area between the land border of France with Belgium and a line drawn 20 kilometres inside that border. On 23 March 2010, they were each made the subject of a deportation order from the Prefect and a decision for continued detention.

17 Before the juge des libertés et de la détention (Judge deciding on provisional detention), to which the Prefect had made an application for extension of that detention, Mr Melki and Mr Abdeli disputed the lawfulness of the check made on them and raised the issue of the constitutionality of Article 78-2, fourth paragraph, of the Code of Criminal Procedure, on the ground that that provision prejudices the rights and freedoms guaranteed by the Constitution.

18 By two orders of 25 March 2010, the juge des libertés et de la détention ordered, first, that the question whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure prejudices

the rights and freedoms guaranteed by the Constitution be submitted to the Cour de Cassation and, second, that the detention of Mr Melki and Mr Abdeli be extended by 15 days.

19 According to the referring court, Mr Melki and Mr Abdeli claim that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons.

20 The referring court considers, first, that the issue arises whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure is consistent both with European Union Law ('EU law') and with the Constitution.

21 Second, the Cour de cassation infers from Articles 23-2 and 23-5 of Order No 58-1067, and from Article 62 of the Constitution, that courts adjudicating on the substance, like itself, are denied, by the effect of Organic Law No 2009-1523 which introduced those articles into Order No 58-1067, the opportunity to refer a question to the Court of Justice of the European Union for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel.

22 As it takes the view that its decision on whether to refer the priority question on constitutionality to the Conseil constitutionnel depends on the interpretation of EU law, the Cour de cassation decided, in both cases which are pending, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 267 [TFEU] preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23-5, paragraph 2, of Order No 58-1067 of 7 November 1958, created by Organic Law No 2009-1523 of 10 December 2009, in so far as those provisions require courts to rule as a matter of priority on the submission to the Conseil constitutionnel of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?

2. Does Article 67 [TFEU] preclude legislation such as that resulting from Article 78-2, paragraph 4, of the Code of Criminal Procedure, which provides that "in an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are observed. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order".'

23 By order of the President of the Court of 20 April 2010, Cases C-188/10 and C-189/10 were joined for the purposes of the written and oral procedures and of the judgment.

The questions referred for a preliminary ruling

Admissibility

24 The French Government contends that the references for a preliminary ruling are inadmissible.

25 As regards the first question, the French Government submits that it is purely hypothetical. That question is based on the premiss that the Conseil constitutionnel, when examining whether a law is consistent with the Constitution, may find it necessary to examine whether that law is consistent with EU law. However, according to the case-law of the Conseil constitutionnel, it is not for the Conseil, in the context of review of the constitutionality of laws, but rather for the ordinary and administrative courts to examine whether a law is consistent with EU law. It follows that, under national law, the Conseil d'État and the Cour de cassation are not obliged to refer to the Conseil constitutionnel questions on the compatibility of provisions of national law with EU law, since such questions are not related to the review of constitutionality.

26 As regards the second question, the French Government contends that a reply to that question would serve no purpose. Since 9 April 2010, Mr Melki and Mr Abdeli have no longer been the subject of any measure depriving them of their liberty and, as from that date, the two orders

of the juge des libertés et de la détention have ceased to have any effect. The issue of the compatibility of Article 78-2, fourth paragraph, of the Code of Criminal Procedure with Article 67 TFEU is also irrelevant for the only set of proceedings still pending before the Cour de cassation, given that, as the Conseil constitutionnel recalled in its decision No 2010-605 DC of 12 May 2010, the Conseil maintains that it does not have jurisdiction to examine the compatibility of legislation with EU law, where it is required to review the constitutionality of that legislation.

27 In that regard, suffice it to point out that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 46; Case C-478/07 *Budejovicky Budvar* [2009] ECR I-0000, paragraph 63; and Case C-56/09 *Zanotti* [2010] ECR I-0000, paragraph 15).

28 In this instance, the questions referred concern the interpretation of Articles 67 TFEU and 267 TFEU. It is not apparent from the grounds of the orders for reference that the orders issued by the juge des libertés et de la détention in respect of Mr Melki and Mr Abdeli have ceased to have any effect. Furthermore, it is not obvious that the Cour de cassation's interpretation of how the priority question on constitutionality functions is clearly precluded in the light of the wording of the provisions of national law.

29 Therefore, the presumption of relevance enjoyed by the reference for a preliminary ruling in each of the cases is not rebutted by the objections submitted by the French Government.

30 In those circumstances, the references for a preliminary ruling made in these cases must be declared admissible.

The first question

31 By its first question, the referring court asks, in essence, whether Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, requiring the courts of that Member State to rule as a matter of priority on whether to refer, to the national court responsible for reviewing the constitutionality of laws, a question on whether a provision of national law is consistent with the Constitution, when at the same time the conflict of that provision with EU law is at issue.

Observations submitted to the Court

32 Mr Melki and Mr Abdeli consider that the national legislation at issue in the main proceedings is consistent with EU law, provided that the Conseil constitutionnel examines EU law and, where there is a doubt on the interpretation of that law, makes a reference to the Court of Justice for a preliminary ruling, requesting that the accelerated procedure be applied to that reference pursuant to Article 104a of the Rules of Procedure of the Court of Justice.

33 The French Government is of the opinion that EU law does not preclude the national legislation at issue, since that legislation does not alter or affect the role and the jurisdiction of the national courts in applying EU law. In support of that line of argument, the French Government relies, in essence, on the same interpretation of that legislation as that given – subsequent to the submission of the orders for reference by the Cour de cassation to the Court of Justice – both by the Conseil constitutionnel in its decision No 2010-605 DC of 12 May 2010, and by the Conseil d'État in its decision No 312305 of 14 May 2010.

34 Under that interpretation, the purpose of a priority question on constitutionality cannot be to refer to the Conseil constitutionnel a question on the compatibility of legislation with EU law. It is not for the Conseil, but for the ordinary and administrative courts to examine whether legislation is consistent with EU law, to apply EU law themselves on the basis of their own assessment, and to refer questions to the Court of Justice for a preliminary ruling at the same time as, or subsequent to, the submission of a priority question on constitutionality.

35 In that regard, the French Government contends in particular that, according to the national legislation at issue in the main proceedings, the national court can either rule, under certain conditions, on the substance of the case without awaiting the decision of the Cour de cassation, the Conseil d'État or the Conseil constitutionnel on the priority question on constitutionality, or take the interim or protective measures necessary to ensure the immediate protection of the rights granted to individuals under EU law.

36 Both the French and Belgian Governments claim that the procedural mechanism of the priority question on constitutionality is designed to guarantee to individuals that their request for an examination of the constitutionality of a national provision will actually be dealt with, without its being possible for referral to the Conseil constitutionnel to be precluded on the basis that the provision in question is incompatible with EU law. In addition, referral to the Conseil constitution-

nel has the advantage that the Conseil can repeal a law which is incompatible with the Constitution, and that repeal then has an effect *erga omnes*. By contrast, the effects of a judgment of an ordinary or administrative court, which finds that a national provision is incompatible with EU law, are limited to the specific case decided by that court.

37 The Czech Government suggests that the Court reply that it follows from the principle of primacy of EU law that the national court is required to ensure that EU law is given full effect, by examining whether national law is compatible with EU law and by not applying those provisions of national law which are contrary to EU law, without having first to refer the matter to the national constitutional court or another national court. According to the German Government, the exercise of the right to make a reference to the Court of Justice for a preliminary ruling, which is conferred on every national court or tribunal by Article 267 TFEU, must not be obstructed by a provision of national law which makes a reference to the Court of Justice, for an interpretation of EU law, subject to the decision of another national court. The Polish Government is of the opinion that Article 267 TFEU does not preclude legislation such as that covered by the first question referred, given that the procedure laid down in that legislation does not adversely affect the substance of the rights and obligations of national courts resulting from Article 267 TFEU.

38 The Commission considers that EU law, and in particular the principle of primacy of that law and Article 267 TFEU, precludes national legislation such as that described in the orders for reference, where every challenge to the compatibility of a legislative provision with EU law enables the individual to rely on a breach of the Constitution by that legislative provision. In that case, the burden of ensuring that EU law is observed is implicitly but necessarily transferred from the court ruling on the substance of a case to the Conseil constitutionnel. Consequently, the mechanism of the priority question on constitutionality leads to a situation such as that held to be contrary to EU law by the Court in Case 106/77 *Simmenthal* [1978] ECR 629. The fact that the constitutional court may, itself, refer questions to the Court of Justice for a preliminary ruling does not remedy that situation.

39 If, on the other hand, a challenge to the compatibility of a legislative provision with EU law does not enable the individual *ipso facto* to challenge the compatibility of the same legislative provision with the Constitution, such that the court ruling on the substance of a case retains jurisdiction to apply EU law, then EU law does not preclude national legislation such as that covered by the first question referred, in so far as a number of criteria are met. According to the Commission, the national court must remain free, simultaneously, to refer to the Court of Justice for a preliminary ruling any question which it considers necessary, and to adopt any measure necessary to ensure provisional judicial protection of the rights guaranteed under EU law. It is also necessary, first, that the interlocutory procedure for the review of constitutionality does not lead to a stay of the substantive proceedings for an excessively long period and, second, that, at the end of that interlocutory procedure and irrespective of its outcome, the national court remains entirely free to assess whether the national legislative provision is consistent with EU law, to disapply that provision if that court holds that it is contrary to EU law, and to refer questions to the Court of Justice for a preliminary ruling if it considers that to be necessary.

The Court's reply

40 Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the Union and the validity of those acts. The second paragraph of that article provides that a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of that article provides that the national court or tribunal is bound to make a reference if there is no judicial remedy under national law against its decisions.

41 It follows that, first, while it might be convenient, in certain circumstances, for questions of purely national law to be settled at the time the reference is made to the Court (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 6), national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (see, inter alia, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 3; Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 44; and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 88).

42 The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, *Rheinmühlen-Düsseldorf*, paragraphs 4 and 5, and *Cartesio*, paragraph 94). The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 *ERG and Others* [2010] ECR I-0000, paragraph 32).

43 Second, the Court has already held that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, inter alia, *Simmenthal*, paragraphs 21 and 24; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 73; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 72; and Case C-314/08 *Filipiak* [2009] ECR I-0000, paragraph 81).

44 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law (see *Simmenthal*, paragraph 22, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20). This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (see, to that effect, *Simmenthal*, paragraph 23).

45 Lastly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration, that a rule of national law is unconstitutional, is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law (see *Mecanarte*, paragraphs 39, 45 and 46).

46 As regards the conclusions to be drawn from the case-law referred to above in relation to national provisions such as those covered by the first question referred, it should be observed that the referring court starts from the premiss that, under those provisions, when considering a question on constitutionality which is based on the fact that the legislation in question is not consistent with EU law, the Conseil constitutionnel also assesses whether that legislation is compatible with EU law. If that is so, where the court ruling on the substance submits the question on constitutionality, it could, before that submission, neither rule on whether the legislation concerned is compatible with EU law, nor refer a question in relation to that legislation to the Court of Justice for a preliminary ruling. Moreover, if the Conseil constitutionnel were to hold that the legislation in question is consistent with EU law, the court ruling on the substance also could not, after the Conseil constitutionnel's decision – which is binding on all judicial authorities – has been delivered, refer a question to the Court of Justice for a preliminary ruling. The same would be true where the plea alleging that a legislative provision is unconstitutional is raised during proceedings before the Conseil d'État or the Cour de cassation.

47 Under that interpretation, the national legislation at issue in the main proceedings would result in the ordinary and administrative national courts being prevented, both before submitting a question on constitutionality and, as the case may be, after the decision of the Conseil constitutionnel on that question, from exercising their right or fulfilling their obligation, provided for in Article 267 TFEU, to refer questions to the Court of Justice for a preliminary ruling. It must be stated that it follows from the principles set out in the case-law cited in paragraphs 41 to 45 above that Article 267 TFEU precludes national legislation such as that described in the orders for reference.

48 However, as is apparent from paragraphs 33 to 36 above, the French and Belgian Governments have advanced a different interpretation of the French legislation covered by the first question referred, relying on, inter alia, the decision of the Conseil constitutionnel No 2010-605 DC of 12 May 2010, and the decision of the Conseil d'État No 312305 of 14 May 2010, which were delivered after the Cour de cassation submitted its orders for reference to the Court of Justice.

49 In that regard, it should be borne in mind that it is for the referring court to determine, in the cases before it, what the correct interpretation of national law is.

50 Under settled case-law, it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law (Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39; Case C-115/08 *ČEZ* [2009] ECR I-0000, paragraph 138; and Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 70). In the light of the aforementioned decisions of the Conseil constitutionnel and the Conseil d'État, such an

interpretation of the national provisions which introduced the mechanism for review of constitutionality at issue in the main proceedings cannot be ruled out.

51 An examination of the question whether it is possible to interpret the mechanism of the priority question on constitutionality in accordance with the requirements of EU law cannot undermine the essential characteristics of the system of cooperation between the Court of Justice and the national courts, established by Article 267 TFEU, as they result from the case-law cited in paragraphs 41 to 45 above.

52 According to the settled case-law of the Court, in order to ensure the primacy of EU law, the functioning of that system of cooperation requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.

53 In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU nevertheless requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.

54 It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly (see, to that effect, Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 15 to 20; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27; and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 53).

55 To the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law – which merely transposes the mandatory provisions of a European Union directive – on the basis that that law is contrary to the national constitution, the Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.

56 Before the interlocutory review of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the third paragraph of Article 267 TFEU – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU. In the case of a national implementing law with such content, the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive. In addition, imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.

57 Accordingly, the reply to the first question referred is that Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

– to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,

– to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and

– to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law.

The second question

58 By its second question, the referring court seeks to know, in essence, whether Article 67 TFEU precludes national legislation which permits police authorities, within an area of 20 kilometres from the land border of a Member State with States party to the CISA, to check the identity of any person in order to ascertain whether he fulfils the obligations laid down by law to hold, carry and produce papers and documents.

Observations submitted to the Court

59 Mr Melki and Mr Abdeli are of the opinion that Articles 67 TFEU and 77 TFEU provide, purely and simply, that there should be no internal border controls and that the Treaty of Lisbon, on that basis, made freedom of movement for persons absolute, irrespective of the nationality of the persons concerned. Accordingly, that freedom of movement precludes a restriction such as that provided for in Article 78-2, fourth paragraph, of the Code of Criminal Procedure, which authorises the national authorities to carry out systematic identity checks in border areas. Furthermore, they seek an order that Article 21 of Regulation No 562/2006 is invalid, on the ground that it infringes in itself the absolute nature of the right to come and go as enshrined in Articles 67 TFEU and 77 TFEU.

60 The French Government contends that the national provisions at issue in the main proceedings are justified by the need to combat a specific type of criminality at border crossings and along borders which present specific risks. The identity checks carried out on the basis of Article 78-2, fourth paragraph, of the Code of Criminal Procedure fully comply with Article 21(a) of Regulation No 562/2006. Their purpose is to establish the identity of a person, either in order to prevent the commission of offences or disruption to public order, or to seek the perpetrators of an offence. Those controls are also based on general information and police experience which have shown the particular benefit of checks in those areas. They are carried out on the basis of police information – coming from earlier police inquiries or from information obtained in the context of cooperation between the police forces of different Member States – which guide the placement and timing of the control. Those controls are not fixed, permanent or systematic. On the contrary, they are carried out as spot checks.

61 The German, Greek, Netherlands and Slovak Governments also propose a negative reply to the second question, pointing out that, even after the entry into force of the Treaty of Lisbon, non-systematic police checks in border areas are still permissible in compliance with the conditions laid down in Article 21 of Regulation No 562/2006. Those governments claim, inter alia, that identity checks in those areas, pursuant to the national legislation at issue in the main proceedings, are distinguishable by their purpose, their content, the way they are carried out and their effect from border control for the purpose of Article 20 of Regulation No 562/2006. Those checks can be authorised pursuant to the provisions of Article 21(a) or (c) of that regulation.

62 By contrast, the Czech Government and the Commission consider that Articles 20 and 21 of Regulation No 562/2006 preclude national legislation such as that at issue in the main proceedings. The checks under that legislation constitute disguised border controls which cannot be authorised under Article 21 of Regulation No 562/2006, given that they are only permitted in border areas and are subject to no condition other than that the person checked be in one of those areas.

The Court's reply

63 As a preliminary point, it should be noted that the referring court has not referred for a preliminary ruling a question on the validity of a provision of Regulation No 562/2006. As Article 267 TFEU does not constitute a means of redress available to the parties to a case pending before a national court, the Court cannot be compelled to evaluate the validity of EU law on the sole ground that that question has been put before it by one of the parties (Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 28).

64 In relation to the interpretation sought by the referring court of Article 67 TFEU, paragraph 2 of which provides that the Union is to ensure the absence of internal border controls for persons, it should be pointed out that that article is part of Chapter 1, entitled 'General Provisions', of Title V of the Treaty on the Functioning of the European Union, and that it is apparent from the very wording of that article that it is the Union itself which is the addressee of the obligation which it lays down. Chapter 1 also contains Article 72, which reproduces the reservation contained in Article 64(1) EC, relating to the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

65 Chapter 2 of Title V contains specific provisions on the policy on border checks, and in particular Article 77 TFEU, which is the successor to Article 62 EC. Under Article 77(2)(e), the European Parliament and the Council are to adopt measures concerning the absence of any

controls on persons when crossing internal borders. It follows that the provisions adopted on that basis must be taken into account, in particular Articles 20 and 21 of Regulation No 562/2006, in order to determine whether EU law precludes national legislation such as that in Article 78-2, fourth paragraph, of the Code of Criminal Procedure.

66 The Community legislature implemented the principle of the absence of internal border controls by adopting, pursuant to Article 62 EC, Regulation No 562/2006 which seeks, according to Recital 22 in the preamble to that regulation, to build on the Schengen *acquis*. That regulation establishes, in Title III, a Community scheme on the crossing of internal borders, replacing Article 2 of the CISA as from 13 October 2006. The applicability of that regulation has not been affected by the entry into force of the Treaty of Lisbon. Protocol No 19 annexed thereto expressly provides that the Schengen *acquis* remains applicable.

67 Article 20 of Regulation No 562/2006 provides that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Under Article 2, point 10, of that regulation 'border checks' means the checks carried out at border crossing points, to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it.

68 As regards the controls provided for in Article 78-2, fourth paragraph, of the Code of Criminal Procedure, it must be observed that they are carried out not 'at borders' but within the national territory and they do not depend on movement across the border by the person checked. In particular, they are not carried out at the time when the border is crossed. Thus, those controls constitute not border checks prohibited under Article 20 of Regulation No 562/2006, but checks within the territory of a Member State, covered by Article 21 of that regulation.

69 Article 21(a) of Regulation No 562/2006 provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas. It follows that controls within the territory of a Member State are, pursuant to Article 21(a), prohibited only where they have an effect equivalent to border checks.

70 The exercise of police powers may not, under the second sentence of that provision, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective; are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime; are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; and, lastly, are carried out on the basis of spot-checks.

71 In relation to the question whether the exercise of the control powers granted by Article 78-2, fourth paragraph, of the Code of Criminal Procedure has an effect equivalent to border checks, it must be held, first, that the objective of the control under that provision is not the same as that of border control within the meaning of Regulation No 562/2006. The objective of that border control, according to Article 2, points 9 to 11, of that regulation, is, first, to ensure that persons may be authorised to enter the territory of the Member State or authorised to leave it and, second, to prevent persons from circumventing border checks. By contrast, the national provision in question relates to checking whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. The possibility for a Member State to provide for such obligations in its national law is not, pursuant to Article 21(c) of Regulation No 562/2006, affected by the abolition of border control at internal borders.

72 Second, the fact that the territorial scope of the power granted by the national provision at issue in the main proceedings is limited to a border area does not suffice, in itself, to find that the exercise of that power has an equivalent effect within the meaning of Article 21(a) of Regulation No 562/2006, in view of the wording and objective of Article 21. However, as regards controls on board an international train or on a toll motorway, the national provision at issue in the main proceedings lays down specific rules regarding its territorial scope, a factor which might constitute evidence of the existence of such an equivalent effect.

73 Furthermore, Article 78-2, fourth paragraph, of the Code of Criminal Procedure, which authorises controls irrespective of the behaviour of the person concerned and of specific circumstances giving rise to a risk of breach of public order, contains neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis – for the purposes of preventing the practical application of that power, by the competent authorities, from leading to controls with an effect equivalent to border checks within the meaning of Article 21(a) of Regulation No 562/2006.

74 In order to comply with Articles 20 and 21(a) of Regulation No 562/2006, interpreted in the light of the requirement of legal certainty, national legislation granting a power to police authorities to carry out identity checks – a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order – must provide the necessary framework for the power granted to those authorities in order, inter

alia, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of Article 21(a) of Regulation No 562/2006.

75 In those circumstances, the answer to the second question referred is that Article 67(2) TFEU, and Articles 20 and 21 of Regulation No 562/2006, preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the CISA, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:**

– **to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,**

– **to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and**

– **to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law.**

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of European Union law.

2. **Article 67(2) TFEU, and Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen (Luxembourg) on 19 June 1990, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.**

4. Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

B. Family Migration

1. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

a) ECtHR, Rodrigues Da Silva and Hoogkamer v. The Netherlands, 31 January 2006

In the case of Rodrigues da Silva and Hoogkamer v. the Netherlands,

The European Court of Human Rights (Former Second Section), sitting as a Chamber composed of: (…)

Having deliberated in private on 14 September 2004 and on 5 January 2006,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 50435/99) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Brazilian national, Ms Solange Rodrigues da Silva, and her daughter, Ms Rachael Hoogkamer, who is a Netherlands national ("the applicants"), on 9 July 1999. Rachael Hoogkamer was represented by her father, Mr Daniël Hoogkamer, who exercises parental authority (*ouderlijk gezag*) over her.

2. - 3. - 4. - 5. - 6 - 7.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant was born in 1972 and lives in Amsterdam. The second applicant was born in 1996 and lives in both Amsterdam and Uithoorn.

9. The first applicant came to the Netherlands in June 1994, leaving her two sons from a previous relationship, Jean (born in 1990) and Carlos (born in 1992), with her parents. In the Netherlands she lived together with her partner Mr Hoogkamer, who was in paid employment at that time. The first applicant submitted that they did look into applying for a residence permit allowing her to reside in the Netherlands with her partner, but, due to the unavailability of documents concerning Mr Hoogkamer's income, such an application was never actually made.

10. In April 1995 the first applicant's son Carlos joined his mother and Mr Hoogkamer. Her other son Jean remained in Brazil with his grandparents.

11. On 3 February 1996 Rachael, the second applicant, was born to the first applicant and Mr Hoogkamer. The first applicant was *ipso jure* invested with parental authority over Rachael. Rachael was recognised (*erkenning*) by Mr Hoogkamer on 28 March 1996, as a result of which she obtained Dutch nationality.

12. The first applicant and Mr Hoogkamer split up in January 1997. Rachael stayed with her father, who subsequently applied to the Amsterdam District Court (*kantonrechter*) in order to be awarded parental authority (*ouderlijk gezag*) over Rachael. The District Court complied with this request on 20 February 1997, against which decision the first applicant appealed to the Amsterdam Regional Court (*arrondissementsrechtbank*). The Regional Court requested the Child Care and Protection Board (*Raad voor de Kinderbescherming*) to examine which attribution of parental authority would be in Rachael's best interests.

13. On 12 August 1997 the first applicant applied, also on behalf of her son Carlos, for a residence permit which would allow her to reside in the Netherlands, either – depending on the outcome of the proceedings concerning the parental authority – with her daughter Rachael or in order to have access to her.

14. The Child Care and Protection Board stated, in its report of 26 August 1997, that parental authority ought to remain with Mr Hoogkamer. In view of the likelihood of the first applicant having to return to Brazil, her having parental authority over Rachael could lead to a rupture of the contacts between Rachael and her father, as well as between Rachael and her paternal grandparents, who were very important to Rachael. It was considered that this would be a traumatic experience for Rachael who had her roots in the Netherlands and whose bonding with all the persons concerned had taken place in that country.

15. In a decision of 26 November 1997, the Amsterdam Regional Court nevertheless quashed the decision of the District Court and awarded the first applicant parental authority over Rachael. Mr Hoogkamer filed an appeal on points of law to the Supreme Court (*Hoge Raad*).

16. On 12 January 1998 the Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected the first applicant's request for a residence permit. The first applicant lodged an objection (*bezwaar*) against this decision. At the hearing on this objection before an official committee (*ambtelijke commissie*) on 27 May 1998, it was stated on behalf of the first applicant that she worked (illegally, as she was not in possession of a residence permit allowing her to do so) from Monday to Thursday and that on those days Rachael stayed either with her father or with her grandparents. Rachael stayed with her mother on the remaining days of the week.

17. On 12 June 1998 the Deputy Minister rejected the objection, holding that, even if account was taken of Rachael's right to reside in the Netherlands and to be brought up and educated there, the interests of the economic well-being of the country outweighed the interests of the first applicant. Although the first applicant did not claim welfare benefits, she did not pay taxes or social security contributions either, and there was a sufficient number of nationals of European Union member States or aliens residing lawfully in the Netherlands available to fill the post she was occupying. The general interest also prevailed over Mr Hoogkamer's interest in being able to exercise his family life with Rachael in the Netherlands. In this context it was noted that at the time Mr Hoogkamer started the relationship with the first applicant, the latter had not been entitled to reside in the Netherlands. He had thus accepted that family life with Rachael might have to be enjoyed elsewhere or in a different manner. It was further noted that Mr Hoogkamer did not make a substantial financial contribution to Rachael's care and upbringing since he only took care of those expenses on the days Rachael stayed with him and, as he was in receipt of welfare benefits, those costs were borne by public funds.

18. The first applicant filed an appeal against the Deputy Minister's decision to the Regional Court of The Hague sitting in Haarlem.

19. On 30 October 1998 the Supreme Court quashed the Amsterdam Regional Court's decision of 26 November 1997 in the proceedings concerning parental authority and referred the case to the Amsterdam Court of Appeal (*gerechtshof*).

20. The Regional Court of The Hague, sitting in Haarlem, rejected the appeal against the refusal to grant the first applicant a residence permit. In its decision of 12 February 1999, the Regional Court held that Article 8 of the Convention did not oblige the national authorities to ensure that Rachael's parents would not have to choose between leaving Rachael with her father in the Netherlands or letting her go to Brazil with her mother. Both these options were considered to be realistically feasible. According to the Regional Court, the fact that Rachael would have to miss either her father or her mother was, strictly speaking, the result of the parent's choice to conceive a child at a time when the first applicant was not allowed to reside in the Netherlands. No further appeal lay against this decision.

21. On 28 June 1999 a hearing took place before the Amsterdam Court of Appeal in the proceedings on the question of parental authority, during which an officer of the Child Care and Protection Board told the court that that organisation's report of 26 August 1997 remained pertinent and that it was in Rachael's best interests for the status quo – with Mr Hoogkamer having parental authority over her – to be maintained. In its decision of 15 July 1999 the Amsterdam Court of Appeal confirmed the decision of the Amsterdam District Court of 20 February 1997 by which parental authority over Rachael had been awarded to Mr Hoogkamer. The Court of Appeal accepted that Mr Hoogkamer, supported by Rachael's grandparents, was sufficiently capable of providing Rachael with the necessary upbringing and care, and that he was indeed doing so in practice. It was of the opinion that the submissions made by the first applicant in support of her argument that Rachael's interests would be better served if parental authority was awarded to her – even if this meant that Rachael was to live in Brazil without contacts with her father and grandparents – were of insufficient weight compared to the possibilities which the father had to offer and was offering. The first applicant filed an appeal on points of law against this decision, but this was rejected by the Supreme Court on 27 October 2000.

22. In spite of having received a letter dated 8 July 1999 from the local police informing her that she had to leave the Netherlands within two weeks, the first applicant remains in the Netherlands. She works from Monday to Friday. Rachael stays with her at the weekend and with her paternal grandparents during the week. This arrangement is confirmed in a letter dated 20 March 2002 written by Rachael's grandparents to the applicants' legal representative:

> "The access arrangement which we have concluded with [the first applicant], the mother of our granddaughter Rachael Hoogkamer, is fully satisfactory for all parties. According to the arrangement, Rachael stays with us during the week. On Friday evening we take her to her mother and collect her again on Sunday at the end of the afternoon. No disagreement whatsoever has arisen on this point in the past years. We further establish that the weekend visits of our granddaughter to her mother take place in a very pleasant fashion and that she enjoys telling us about them. In other words, the close contacts with her mother have a beneficial effect on our granddaughter."

23. In January 2002 the first applicant applied for a residence permit allowing her to reside in the Netherlands with her new Dutch partner. In this application the first applicant indicated that Rachael was being brought up partly by her grandparents and partly by her new family. The

application was rejected on 18 April 2002 as the first applicant was not in possession of the required provisional residence visa (*machtiging tot voorlopig verblijf*). The first applicant did not challenge this decision.

24. The second son of the first applicant, Jean, has been living with his mother in the Netherlands since February 2002.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. Parental authority comprises the duty and the right of a parent to care for and bring up his or her child (Article 247 § 1 of the Civil Code (*Burgerlijk Wetboek* – "CC")). The parent invested with parental authority is the child's statutory representative (*wettelijk vertegenwoordiger*) and administers the child's possessions (Article 245 § 4 CC).

26. At the material time, the admission, residence and expulsion of aliens were regulated by the Aliens Act 1965 (*Vreemdelingenwet 1965*). On 1 April 2001 a new Aliens Act entered into force but this has no bearing on the present case.

27. The Government pursue a restrictive immigration policy due to the population and employment situation in the Netherlands. Aliens are eligible for admission only on the basis of obligations arising from international agreements, or if their presence serves an essential national interest, or on compelling humanitarian grounds.

28. The admission policy for family reunion purposes was laid down in the Aliens Act Implementation Guidelines 1994 (*Vreemdelingencirculaire 1994*). It provided that the spouse, the partner, a minor child born of the marriage or relationship and actually belonging to the family unit (*gezin*), and a minor child born outside the marriage but actually belonging to the family unit could be eligible for family reunion if certain conditions (relating to public order, accommodation and livelihood) were met. In the context of family reunion with other family members (so-called extended family reunion), such other members actually belonging to the family unit could also be eligible, in so far as they would otherwise suffer disproportionate hardship.

29. The phrase "actually belonging to the family unit" (*feitelijk behoren tot het gezin*) used in Netherlands law only partly overlaps with the term "family life" in Article 8 of the Convention. The alien in question must belong to the family unit with which he or she intends to live in the Netherlands in order to qualify for admission. If it is concluded that the requirement of "actually belonging to the family unit" has not been met, an independent investigation is then carried out to ascertain whether the concept of family life within the meaning of Article 8 of the Convention applies and, if so, whether this provision obliges the State to allow the person concerned to live in the Netherlands, having regard to the specific circumstances of the case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Arguments of the parties

1. The applicants

30. The applicants complained that the refusal to grant the first applicant a residence permit constituted a breach of their right to respect for their family life. They invoked Article 8 of the Convention which, in so far as relevant, provides as follows:

> "1. Everyone has the right to respect for his... family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of... the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

31. The applicants argued that if paramount importance was attached to the fact of the first applicant's illegal stay, the balancing exercise which had to be carried out by the domestic authorities was reduced to unacceptable proportions. Rachael – who was an independent party to these proceedings – had her own, individual, interests which also required consideration: it could not and should not be held against her that she had been conceived during her mother's illegal stay.

32. In the view of the applicants, the present case fell to be compared with that of *Şen v. the Netherlands* (no. 31465/96, 21 December 2001), which concerned a young girl who, like the first applicant, had not previously lawfully resided in the Netherlands. In that case the Court had considered that the parents' strong ties with the Netherlands constituted an essential element to be taken into account in the balancing exercise. Rachael also had very strong ties to the Netherlands. In addition, just as in the *Şen* case, there existed a major obstacle in the instant case to family life being developed in Brazil. Since the first applicant was not entrusted with parental authority over Rachael, she did not have the power to make decisions relating to her daughter's place of residence – and Rachael's father had always maintained that he would not give permission for Rachael to leave for Brazil. If the first applicant was forced to leave Rachael behind in the Netherlands, the latter would be without the close proximity and care of her mother

– elements of essential importance to a young girl. The applicants emphasised that an annual visit to the Netherlands of the mother would not even come close to securing Rachael's interests.

33. Finally, it was the applicants' distinct impression, obtained in the course of the proceedings relating to the parental authority, that it was precisely in order to avoid a situation whereby the Netherlands national Rachael would (have to) leave for Brazil that parental authority had been awarded to her father, despite the fact that he did not, and still does not, play a significant role in her care and upbringing. There was no other identifiable reason why the father, who was not the parent looking after Rachael, should have been entrusted with parental authority rather than the mother, who was looking after her.

2. The Government

34. The Government stressed that the family life invoked by the applicants had developed while the first applicant was living in the Netherlands illegally. In their opinion, this constituted a decisive difference with the case of *Berrehab v. the Netherlands* (judgment of 21 June 1988, Series A no. 138), since that case related to a refusal to allow continued residence, whereas in the present case the first applicant had not previously resided lawfully in the Netherlands. This illegality was mainly the result of the first applicant's own actions – or lack thereof: neither she nor her partner Mr Hoogkamer had made any serious effort to legalise her residence on the basis of the fact that in the period from June 1994 to January 1997 they had been in a lasting relationship with each other, which made lawful residence in the Netherlands possible.

35. The Government further submitted that Rachael's father had long since ceased to play a prominent part in her daily care and upbringing. This being so, the parents might have agreed that Rachael would be cared for by the first applicant and would accompany her to Brazil. Since Rachael had only been three years old at the time of the contested decision, she did not have such deep roots in the Netherlands that she would have been unable to adapt to life in Brazil, especially as her half-brothers, along with her mother, might be assumed to provide her with a familiar and supportive environment there. Even if Rachael were to live with her grandparents in the Netherlands, the first applicant would be able to maintain family ties to some extent, since she had the right to visit the Netherlands for short periods. In this context the Government pointed to the fact that even now the first applicant was not living with Rachael all of the time.

36. The Government concluded that Rachael's having to forsake family life with either her father or her mother did not give rise to a positive obligation on their part to admit the first applicant, since this state of affairs had come about as a direct result of Rachael's parents' deliberate decision to enter into a relationship and develop family life with each other and the daughter born of their relationship, even though the mother had no right to reside in the Netherlands.

B. The Court's assessment

37. The Court observes from the outset that there can be no doubt that there is family life within the meaning of Article 8 of the Convention between the first applicant and her daughter Rachael, the second applicant: Rachael was born from a genuine relationship, in which her parents cohabited as if they were married.

38. Next, it observes that the present case concerns the refusal of the domestic authorities to allow the first applicant to reside in the Netherlands; although she has been living in that country since 1994, her stay there has at no time been lawful. Therefore, the impugned decision did not constitute an interference with the applicants' exercise of the right to respect for their family life in that a resident status, entitling the first applicant to remain in the Netherlands, was withdrawn. The question to be examined in the present case is rather whether the Netherlands authorities were under a duty to allow the first applicant to reside in the Netherlands, thus enabling the applicants to maintain and develop family life in their territory. For this reason the Court agrees with the parties that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (see *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2031, § 63).

39. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the

persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (*Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999).

40. Turning to the circumstances of the present case, the Court notes that the first applicant moved from her native Brazil to the Netherlands in 1994 at the age of 22. Even though she has now been living in the latter country for a considerable time, she must still have links with Brazil, where she presumably grew up and underwent her schooling.

41. However, if the first applicant was to return to Brazil she would have to leave her daughter Rachael behind in the Netherlands. The Court observes in this connection that at the time the final decision on her application for a residence permit was taken on 12 February 1999, the first applicant no longer had parental authority over Rachael, the Supreme Court having quashed the decision of the Amsterdam Regional Court which had awarded her such authority (see paragraphs 19 and 20 above). It was Rachael's father, Mr Hoogkamer, to whom parental authority was subsequently, and finally, attributed. In its assessment of this issue, the Amsterdam Court of Appeal had regard to a report which had been drawn up by the Child Care and Protection Board in August 1997 – prior to the final decision in the residence proceedings –, according to which it would be traumatic for Rachael if she had to leave the Netherlands in view, *inter alia*, of the strong bond she had with her paternal grandparents (see paragraph 14 above). Parental authority having been awarded to Mr Hoogkamer, the first applicant is thus simply not able to take Rachael with her without his permission which, as has not been disputed by the Government, will not be forthcoming.

In these circumstances, the Court considers that the Government's claim that the first applicant and Mr Hoogkamer might have agreed that Rachael would move to Brazil with her mother is untenable, bearing in mind that it was the Dutch courts, following the advice of the Dutch child care authorities, who concluded that it was in Rachael's best interests to stay in the Netherlands.

42. The Court further notes that, from a very young age, Rachael has been raised jointly by the first applicant and her paternal grandparents, with her father playing a less prominent role. She spends three to four days a week with her mother (see paragraphs 16 and 22 above), and, as confirmed by her grandparents (see paragraph 22 above), has very close ties with her. The refusal of a residence permit and the expulsion of the first applicant to Brazil would in effect break those ties as it would be impossible for them to maintain regular contacts, which would be the more serious given that Rachael, who was only three years old at the time of the final decision, needed to remain in contact with her mother (see *Berrehab*, cited above, p. 16, § 29).

43. Whilst it does not appear that the first applicant has been convicted of any criminal offences (see *Berrehab*, cited above, p. 16, § 29, and *Cılız v. the Netherlands*, no. 29192/95, § 69, *Reports* 2000-VIII), she did not attempt to regularise her stay in the Netherlands until more than three years after first arriving in that country (see paragraphs 9 and 13 above) and her stay there has been illegal throughout. The Court reiterates that persons who, without complying with the regulations in force, confront the authorities of a Contracting State with their presence in the country as a *fait accompli* do not, in general, have any entitlement to expect that a right of residence will be conferred upon them (see *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003). Nevertheless, the Court finds relevant that in the present case the Government indicated that lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997 (see paragraph 34). Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case falls to be distinguished from others in which the Court considered that the persons concerned could not at any time reasonably expect to be able to continue family life in the host country (see, for example, *Solomon v. the Netherlands*, cited above).

44. In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the first applicant to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism.

The Court concludes that no fair balance was struck between the different interests at stake and that, accordingly, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. - 46.- 47.- 48. - 49. - 50. - 51. - 52. (…)

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

3. *Holds*

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 145.30 (one hundred and forty-five euros and thirty cents) in respect of costs and expenses, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 January 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

b) ECJ C-540/03, European Parliament v. Council, 27 June 2006

JUDGMENT OF THE COURT (Grand Chamber)

27 June 2006 (*)

(Immigration policy – Right to family reunification of minor children of third country nationals – Directive 2003/86/EC – Protection of fundamental rights – Right to respect for family life – Obligation to have regard to the interests of minor children)

In Case C-540/03,

ACTION for annulment under Article 230 EC, brought on 22 December 2003,

European Parliament, represented by H. Duintjer Tebbens and A. Caiola, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by O. Petersen and M. Simm, acting as Agents,

defendant,

supported by

Commission of the European Communities, represented by C. O'Reilly and C. Ladenburger, acting as Agents, with an address for service in Luxembourg,

intervener,

and by

Federal Republic of Germany, represented by A. Tiemann, W.-D. Plessing and M. Lumma, acting as Agents,

intervener,

THE COURT (Grand Chamber),

gives the following

Judgment

1 By its application, the European Parliament seeks the annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12; 'the Directive').

2 By order of the President of the Court of 5 May 2004, the Commission of the European Communities and the Federal Republic of Germany were granted leave to intervene in support of the form of order sought by the Council of the European Union.

The Directive

3 The Directive, founded on the EC Treaty and in particular Article 63(3)(a) thereof, determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

4 The second recital in the preamble to the Directive is worded as follows:

'Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union [OJ 2000 C 364, p. 1; 'the Charter'].'

5 The 12th recital states:

'The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.'

6 Article 3 provides that the Directive is to apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

7 Article 3(4) of the Directive states:

'This Directive is without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;

(b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.'

8 Article 4(1) of the Directive provides that the Member States are to authorise the entry and residence, pursuant to the Directive, of, in particular, the minor children, including adopted children, of the sponsor and his or her spouse, and those of the sponsor or of the sponsor's spouse where that parent has custody of the children and they are dependent on him or her. In accordance with the penultimate subparagraph of Article 4(1), the minor children referred to in this article must be below the age of majority set by the law of the Member State concerned and must not be married. The final subparagraph of Article 4(1) provides:

'By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.'

9 Article 4(6) of the Directive is worded as follows:

'By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.'

10 Article 5(5) of the Directive requires the Member States to have due regard to the best interests of minor children when examining an application.

11 Article 8 of the Directive provides:

'Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.'

12 Article 16 of the Directive lists some circumstances in which Member States may reject an application for entry and residence for the purpose of family reunification or, if appropriate, withdraw or refuse to renew a family member's residence permit.

13 Article 17 of the Directive is worded as follows:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

14 Under Article 18 of the Directive, where an application for family reunification is rejected or a residence permit is either withdrawn or not renewed, the right must exist to mount a legal challenge in accordance with the procedure and the jurisdiction established by the Member States concerned.

Admissibility of the action

The plea alleging that the action does not actually concern an act of the institutions

15 The provisions whose annulment is sought are derogations from the obligations imposed by the Directive on the Member States, permitting them to apply national legislation which, according to the Parliament, does not respect fundamental rights. The Parliament submits, however, that, inasmuch as the Directive authorises such national legislation, it is the Directive itself which infringes fundamental rights. It cites in this connection the judgment in Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 84.

16 The Council, on the other hand, emphasises that the Directive gives the Member States leeway enabling them to retain or adopt national provisions compatible with respect for fundamental rights. In the Council's submission, the Parliament does not show how provisions adopted and applied by Member States which might be contrary to fundamental rights would constitute action of the institutions within the meaning of Article 46(d) EU that is subject to review by the Court so far as concerns respect for fundamental rights.

17 In any event, the Council wonders how the Court could review in purely abstract terms the legality of provisions of Community law which merely refer to national law whose content, and the manner in which it will be applied, are unknown. The need to take the specific circumstances into account is apparent from the judgments in Case C-60/00 *Carpenter* [2002] ECR I-6279 and in *Lindqvist*.

18 The Commission submits that review by the Court of compliance with fundamental rights that are among the general principles of Community law cannot be limited solely to the situation where a provision of a directive obliges the Member States to adopt specified measures infringing those fundamental rights, but must also extend to the case where the directive expressly permits such measures. Member States should not be expected to realise by themselves that a given measure permitted by a Community directive is contrary to fundamental rights. The Commission concludes that review by the Court cannot be precluded on the ground that the contested provisions of the Directive merely refer to national law.

19 The Commission observes, however, that the Court should annul provisions such as those the subject of the present action only if it were impossible for it to interpret them in a manner consistent with fundamental rights. If, in light of the customary rules of interpretation, the provision at issue leaves a margin of appreciation, the Court should rather set out the interpretation thereof that respects fundamental rights.

20 The Parliament responds that to interpret the Directive in the abstract, as suggested by the Commission, would have the effect of establishing a preventive remedy which would encroach upon the powers of the Community legislature.

Findings of the Court

21 It is appropriate, as the Advocate General has done in points 43 to 45 of her Opinion, to address this issue from the point of view of the admissibility of the action. In essence, the Council denies that the action concerns an act of the institutions, pleading that only the application of national provisions retained or adopted in accordance with the Directive could, according to the circumstances, infringe fundamental rights.

22 As to that argument, the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC.

23 Furthermore, a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.

24 It follows that the plea of inadmissibility alleging that the action does not actually concern an act of the institutions must be dismissed.

Severability of the provisions whose annulment is sought

25 The Federal Republic of Germany stresses, first of all, the importance to it of the final subparagraph of Article 4(1) of the Directive, which contains one of the main points of the compromise allowing adoption of the Directive, for which a unanimous vote was required. It observes that partial annulment of an act can be envisaged only where the act comprises several elements which are severable from each other and only one of those elements is unlawful because it infringes Community law. In the present case, it is not possible to sever the rule relating to family reunification laid down in the final subparagraph of Article 4(1) of the Directive from the remainder of the Directive. Any judgment annulling the Directive in part would encroach upon the powers of the Community legislature, so that only annulment of the Directive in its entirety would be possible.

26 The Parliament contests the argument that the final subparagraph of Article 4(1) of the Directive is not an element severable from the Directive simply because its wording is the result of a political compromise which enabled the Directive to be adopted. In the Parliament's submission, what matters is simply whether severance of an element of a directive is legally possible. Inasmuch as the provisions referred to in the application constitute derogations from the general rules laid down by the Directive, their annulment would not undermine the scheme or the effectiveness of the Directive as a whole, whose importance for implementing the right to family reunification the Parliament recognises.

Findings of the Court

27 As follows from settled case-law, partial annulment of a Community act is possible only if the elements whose annulment is sought may be severed from the remainder of the act (see, inter alia, Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraphs 45 and 46; Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, paragraph 29; Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 33; Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraph 12; and Case C-36/04 *Spain* v *Council* [2006] ECR I-0000, paragraph 9).

28 The Court has also repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (Joined Cases C-68/94 and C-30/95*France and Others* v *Commission* [1998] ECR I-1375, paragraph 257; *Commission* v *Council*, paragraph 46; *Germany* v *Commission*, paragraph 34; *France* v *Parliament and Council*, paragraph 13; and *Spain* v *Council*, paragraph 13).

29 In the present case, review of whether the provisions whose annulment is sought are severable requires consideration of the substance of the case, that is to say of the scope of those provisions, in order to be able to assess whether their annulment would alter the Directive's spirit and substance.

The action

The rules of law in whose light the Directive's legality may be reviewed

30 The Parliament contends that the contested provisions do not respect fundamental rights – in particular the right to family life and the right to non-discrimination – as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and as they result from the constitutional traditions common to the Member States of the European Union, as general principles of Community law; the Union has a duty to respect them pursuant to Article 6(2) EU, to which Article 46(d) EU refers with regard to action of the institutions.

31 The Parliament invokes, first, the right to respect for family life, set out in Article 8 of the ECHR, which the Court has interpreted as also covering the right to family reunification (*Carpenter*, paragraph 42, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 59). This principle has been repeated in Article 7 of the Charter which, the Parliament observes, is relevant to interpretation of the ECHR in so far as it draws up a list of existing fundamental rights even though it does not have binding legal effect. The Parliament also cites Article 24 of the Charter, devoted to rights of the child, which provides, in paragraph 2, that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration' and, in paragraph 3, that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

32 The Parliament invokes, second, the principle of non-discrimination on grounds of age which, it submits, is taken into account by Article 14 of the ECHR and is expressly covered by Article 21(1) of the Charter.

33 The Parliament also cites a number of provisions of international Conventions signed under the aegis of the United Nations: Article 24 of the International Covenant on Civil and Political Rights, adopted on 19 December 1966, which entered into force on 23 March 1976; the Convention on the Rights of the Child, adopted on 20 November 1989, which entered into force

on 2 September 1990; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted on 18 December 1990, which entered into force on 1 July 2003; and the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations Organisation on 20 November 1959 (Resolution 1386(XIV)). The Parliament draws attention in addition to Recommendation No R (94) 14 of the Committee of Ministers of the Council of Europe to Member States of 22 November 1994 on coherent and integrated family policies and Recommendation No R (99) 23 of the Committee of Ministers to Member States of 15 December 1999 on family reunion for refugees and other persons in need of international protection. The Parliament invokes, finally, constitutions of several Member States of the European Union.

34 The Council observes that the Community is not a party to the various instruments of public international law invoked by the Parliament. In any event, those norms require merely that the children's interests be respected and taken into account, and do not establish any absolute right regarding family reunification. Nor should the application be examined in light of the Charter given that the Charter does not constitute a source of Community law.

Findings of the Court

35 Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Opinion 2/94 [1996] ECR I-1759, paragraph 33; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 33).

36 In addition, Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

37 The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law (see, inter alia, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 31; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 68; and Case C-249/96 *Grant* [1998] ECR I-621, paragraph 44). That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States.

38 The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'.

39 Subject to the European Social Charter which will be mentioned in paragraph 107 of this judgment, the remaining international instruments invoked by the Parliament do not in any event appear to contain provisions affording greater protection of rights of the child than those contained in the instruments already referred to.

The final subparagraph of Article 4(1) of the Directive

40 The Parliament contends that the reasoning for the final subparagraph of Article 4(1) of the Directive, set out in the 12th recital in the preamble, is not convincing and that the Community legislature has confused the concepts 'condition for integration' and 'objective of integration'. Since one of the most important means of successfully integrating a minor child is reunification with his or her family, it is incongruous to impose a condition for integration before the child, a member of the sponsor's family, joins the sponsor. That renders family reunification unachievable and negates this right.

41 The Parliament further submits that, since the concept of integration is not defined in the Directive, the Member States are authorised to restrict appreciably the right to family reunification.

42 It states that this right is protected by Article 8 of the ECHR, as interpreted by the European Court of Human Rights, and a condition for integration laid down by national legislation does not fall within one of the legitimate objectives capable of justifying interference, as referred

to in Article 8(2) of the ECHR, namely national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. Any interference must, in any event, be justified and proportionate. However, the final subparagraph of Article 4(1) of the Directive does not require any weighing of the respective interests at issue.

43 The Directive is, moreover, contradictory since it does not provide for any limitation founded on a condition for integration so far as concerns the sponsor's spouse.

44 Furthermore, the Directive establishes discrimination founded exclusively on the child's age which is not objectively justified and is contrary to Article 14 of the ECHR. The objective of encouraging parents to have their children come before they are 12 years old does not take account of the economic and social constraints which prevent a family from receiving a child for a short or long period of time. Also, the objective of integration was achievable by less radical means, such as measures for the minors' integration after they have been allowed to enter the host Member State.

45 Finally, the Parliament observes that the standstill clause is less strict than customary standstill clauses, since the national legislation needs to exist only on the date of implementation of the Directive. The leeway which the Member States are allowed runs counter to the Directive's objective, which is to lay down common criteria for exercise of the right to family reunification.

46 The Council, supported by the German Government and the Commission, submits that the right to respect for family life is not equivalent, in itself, to a right to family reunification. According to the case-law of the European Court of Human Rights, it is sufficient that family life be possible, for example, in the State of origin.

47 The Council also observes that, in its case-law, the European Court of Human Rights has recognised that refusals, in implementation of immigration policy, to allow family reunification have been justified by at least one of the aims listed in Article 8(2) of the ECHR. In the Council's submission, such a refusal may be founded on the objective of the final subparagraph of Article 4(1) of the Directive, namely the effective integration of migrants who are minors by encouraging migrant families which are separated to have their minor children come to the host Member State before they are 12 years of age.

48 The choice of the age of 12 years is not arbitrary, but was based on the fact that, before that age, children are in a phase of their development which is important for their capacity to integrate into society. That is what the 12th recital in the preamble to the Directive expresses. The Council observes in this connection that the European Court of Human Rights has found there to be no breach of Article 8 of the ECHR in reunification cases concerning minors below 12 years of age.

49 It is justified to apply a condition for integration to children over 12 years of age and not to the sponsor's spouse because children will, as a general rule, spend a greater proportion of their lives in the host Member State than their parents.

50 The Council observes that the Directive does not prejudge the outcome of the weighing of the individual and collective interests present in individual cases and that Articles 17 and 5(5) of the Directive oblige the Member States to have regard to the interests protected by the ECHR and the Convention on the Rights of the Child.

51 It also maintains that the standstill clause in the final subparagraph of Article 4(1) of the Directive does not call into question the legality of that provision. The reference which is made to the 'date of implementation' of the Directive constitutes a legitimate political choice on the part of the Community legislature, the reason for which was the fact that the Member State which wished to rely on that derogation had not completed the legislative process for adoption of the national rules in question. It was preferable to opt for the criterion ultimately selected than to await completion of that process before adopting the Directive.

Findings of the Court

52 The right to respect for family life within the meaning of Article 8 of the ECHR is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (*Carpenter*, paragraph 41, and *Akrich*, paragraphs 58 and 59). This right to live with one's close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory.

53 Thus, the Court has held that, even though the ECHR does not guarantee as a fundamental right the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the ECHR (*Carpenter*, paragraph 42, and *Akrich*, paragraph 59).

54 In addition, as the European Court of Human Rights held in *Senv.the Netherlands*, no. 31465/96, § 31, 21 December 2001, 'Article 8 [of the ECHR] may create positive obligations inherent in effective "respect" for family life. The principles applicable to such obligations are comparable to those which govern negative obligations. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation (*Gül* [*v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I], p. 174, § 38, and *Ahmut* [*v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2030], § 63)'.

55 In paragraph 36 of *Sen v. the Netherlands*, the European Court of Human Rights set out in the following manner the principles applicable to family reunification as laid down in *Gül v. Switzerland*, § 38, and *Ahmut v. the Netherlands*, § 67:

'(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.

(b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.

(c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.'

56 The European Court of Human Rights has stated that, in its analysis, it takes account of the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives (*Sen v. the Netherlands*, § 37; see also *Rodriguesda Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, 31 January 2006).

57 The Convention on the Rights of the Child also recognises the principle of respect for family life. The Convention is founded on the recognition, expressed in the sixth recital in its preamble, that children, for the full and harmonious development of their personality, should grow up in a family environment. Article 9(1) of the Convention thus provides that States Parties are to ensure that a child shall not be separated from his or her parents against their will and, in accordance with Article 10(1), it follows from that obligation that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification are to be dealt with by States Parties in a positive, humane and expeditious manner.

58 The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

59 These various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.

60 Going beyond those provisions, Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.

61 The final subparagraph of Article 4(1) of the Directive has the effect, in strictly defined circumstances, namely where a child aged over 12 years arrives independently from the rest of the family, of partially preserving the margin of appreciation of the Member States by permitting them, before authorising entry and residence of the child under the Directive, to verify whether he or she meets a condition for integration provided for by the national legislation in force on the date of implementation of the Directive.

62 In so doing, the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests.

63 Furthermore, as required by Article 5(5) of the Directive, the Member States must when weighing those interests have due regard to the best interests of minor children.

64 Note should also be taken of Article 17 of the Directive which requires Member States to take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with

his country of origin. As is apparent from paragraph 56 of the present judgment, such criteria correspond to those taken into consideration by the European Court of Human Rights when it reviews whether a State which has refused an application for family reunification has correctly weighed the competing interests.

65 Finally, a child's age and the fact that a child arrives independently from his or her family are also factors taken into consideration by the European Court of Human Rights, which has regard to the ties which a child has with family members in his or her country of origin, and also to the child's links with the cultural and linguistic environment of that country (see, inter alia, *Ahmut v. the Netherlands*, § 69, and *Gül v. Switzerland*, § 42).

66 As regards conditions for integration, it does not appear that such a condition is, in itself, contrary to the right to respect for family life set out in Article 8 of the ECHR. As has been noted, this right is not to be interpreted as necessarily obliging a Member State to authorise family reunification in its territory, and the final subparagraph of Article 4(1) of the Directive merely preserves the margin of appreciation of the Member States while restricting that freedom, to be exercised by them in observance, in particular, of the principles set out in Articles 5(5) and 17 of the Directive, to examination of a condition defined by national legislation. In any event the necessity for integration may fall within a number of the legitimate objectives referred to in Article 8(2) of the ECHR.

67 Contrary to the Parliament's submissions, the Community legislature has not confused conditions for integration referred to in the final subparagraph of Article 4(1) of the Directive and the objective of integration of minors which could, according to the Parliament, be achieved by means such as measures facilitating their integration after they have been allowed to enter. Two different matters are indeed involved. As follows from the 12th recital in the preamble to the Directive, the possibility of limiting the right to family reunification of children over the age of 12 whose primary residence is not with the sponsor is intended to reflect the children's capacity for integration at early ages and is to ensure that they acquire the necessary education and language skills in school.

68 The Community legislature thus considered that, beyond 12 years of age, the objective of integration cannot be achieved as easily and, consequently, provided that a Member State has the right to have regard to a minimum level of capacity for integration when deciding whether to authorise entry and residence under the Directive.

69 A condition for integration within the meaning of the final subparagraph of Article 4(1) of the Directive may therefore be taken into account when considering an application for family reunification and the Community legislature did not contradict itself by authorising Member States, in the specific circumstances envisaged by that provision, to consider applications in the light of such a condition in the context of a directive which, as is apparent from the fourth recital in its preamble, has the general objective of facilitating the integration of third country nationals in Member States by making family life possible through reunification.

70 The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family.

71 Consequently, the final subparagraph of Article 4(1) of the Directive cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life.

72 The Parliament has not shown how the standstill clause in the final subparagraph of Article 4(1) of the Directive is contrary to a superior rule of law. Since the Community legislature did not infringe the right to respect for family life by authorising the Member States, in certain circumstances, to have regard to a condition for integration, it was lawful for it to set limits on that authorisation. Consequently, it does not matter that the national legislation specifying the condition for integration that can be taken into account had to exist only on the date of implementation of the Directive and not on the date on which it entered into force or was adopted.

73 Nor does it appear that the Community legislature failed to pay sufficient attention to children's interests. The content of Article 4(1) of the Directive attests that the child's best interests were a consideration of prime importance when that provision was being adopted and it does not appear that its final subparagraph fails to have sufficient regard to those interests or authorises Member States which choose to take account of a condition for integration not to have regard to them. On the contrary, as recalled in paragraph 63 of the present judgment, Article 5(5) of the Directive requires the Member States to have due regard to the best interests of minor children.

74 In this context, the choice of the age of 12 years does not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties.

75 Likewise, the fact that a spouse and a child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents. It was therefore justifiable for the Community legislature to take account of those different situations, and it adopted different rules concerning them without contradicting itself.

76 It follows from all of the foregoing that the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

Article 4(6) of the Directive

77 For reasons similar to those relied upon when the final subparagraph of Article 4(1) of the Directive was being examined, the Parliament submits that Article 4(6) of the Directive, which permits the Member States to require applications for family reunification of minor children to be submitted before the age of 15, also infringes the right to respect for family life and the prohibition on discrimination on grounds of age. It also observes that the Member States remain free to adopt new, restrictive, derogating provisions until the date of implementation of the Directive. Finally, the obligation on Member States which apply this derogation to examine applications for entry and residence submitted by minor children over 15 years of age on the basis of 'grounds other than' family reunification which are not defined leaves much to the discretion of the national authorities and creates legal uncertainty.

78 Just as in the case of the final subparagraph of Article 4(1) of the Directive, the Parliament states that the objective of integration was achievable by means less radical than discrimination on grounds of age, which is not objectively justified and is consequently arbitrary.

79 The Council maintains that Article 4(6) of the Directive is open to use, at national level, that is compatible with fundamental rights and, in particular, proportionate to the objective pursued. The objective is to encourage immigrant families to have their minor children come at a very young age, in order to facilitate their integration. This is a legitimate objective, forming part of immigration policy and falling within the scope of Article 8(2) of the ECHR.

80 The broad wording of 'grounds other than' family reunification should not be criticised as a source of legal uncertainty, since it is designed to favour a positive decision on the majority of the applications concerned.

81 The age of 15 years was chosen in order to cover the greatest number of cases while not precluding the minor's attending school in the host Member State. There is thus no arbitrary discrimination. The Council maintains that such a choice falls within its margin of appreciation as legislator.

82 The Commission submits that Article 4(6) of the Directive does not infringe Article 8 of the ECHR because the rights which the persons concerned could derive from the Convention remain entirely preserved. Article 4(6) of the Directive requires Member States to consider every other possible legal basis for an application by the child concerned to be admitted to their territory, and to grant such entry if the legal conditions are met. This must include a right founded directly on Article 8 of the ECHR and thus allow consideration on a case-by-case basis of applications for entry submitted by children who are 15 or older.

83 The age limit set at 15 years is not unreasonable and can be explained by the link that exists between Article 4(6) of the Directive and the waiting period of three years in Article 8 of the Directive. The point is not to issue residence permits to persons who in the meantime have reached the age of majority.

Findings of the Court

84 In the present action, the review conducted by the Court concerns whether the contested provision, in itself, respects fundamental rights and, in particular, the right to respect for family life, the obligation to have regard to the best interests of children and the principle of non-discrimination on grounds of age. It must be determined in particular whether Article 4(6) of the Directive expressly or impliedly authorises the Member States not to observe those fundamental principles in that it allows them, in derogation from the other provisions of Article 4 of the Directive, to formulate a requirement by reference to the age of a minor child for whom application is made for entry into, and residence in, national territory in the context of family reunification.

85 It does not appear that the contested provision infringes the right to respect for family life set out in Article 8 of the ECHR as interpreted by the European Court of Human Rights. Article 4(6) of the Directive does give the Member States the option of applying the conditions for family reunification which are prescribed by the Directive only to applications submitted before children have reached 15 years of age. This provision cannot, however, be interpreted as prohibiting the Member States from taking account of an application relating to a child over 15 years of age or as authorising them not to do so.

86 It does not matter that the final sentence of the contested provision provides that the Member States which decide to apply the derogation are to authorise the entry and residence of children in respect of whom an application is submitted after they have reached 15 years of age 'on grounds other than family reunification'. The term 'family reunification' must be interpreted in the context of the Directive as referring to family reunification in the cases where family reunification is required by the Directive. It cannot be interpreted as prohibiting a Member State which has applied the derogation from authorising the entry and residence of a child in order to enable the child to join his or her parents.

87 Article 4(6) of the Directive must, moreover, be read in the light of the principles set out in Article 5(5) thereof, which requires the Member States to have due regard to the best interests of minor children, and in Article 17, which requires them to take account of a number of factors, one of which is the person's family relationships.

88 It follows that, while Article 4(6) of the Directive has the effect of authorising a Member State not to apply the general conditions of Article 4(1) of the Directive to applications submitted by minor children over 15 years of age, the Member State is still obliged to examine the application in the interests of the child and with a view to promoting family life.

89 For the reason set out in paragraph 74 of the present judgment, it does not appear, a fortiori, that the choice of the age of 15 years constitutes a criterion contrary to the principle of non-discrimination on grounds of age. Nor, for the reason set out in paragraph 72 of the present judgment, does it appear that the standstill clause, as formulated, infringes any superior rule of law.

90 It follows from all of the foregoing that Article 4(6) of the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

Article 8 of the Directive

91 The Parliament observes that the periods of two and three years provided for in Article 8 of the Directive significantly restrict the right to family reunification. This article, which does not require applications to be considered on a case-by-case basis, authorises the Member States to retain measures which are disproportionate in relation to the balance that should exist between the competing interests.

92 The Parliament further submits that the derogation authorised in the second paragraph of Article 8 of the Directive could well give rise to different treatment in similar cases, depending on whether or not the Member State concerned has legislation which takes its reception capacity into account. Finally, a criterion founded on the Member State's reception capacity is equivalent to a quota system, which is incompatible with Article 8 of the ECHR. The Parliament notes in this regard that the restrictive annual quota system applied by the Republic of Austria was held by the Verfassungsgerichtshof (Constitutional Court, Austria) to be contrary to the Austrian Constitution (judgment of 8 October 2003, Case G 119, 120/03-13).

93 The Council observes that Article 8 of the Directive does not in itself require a waiting period and that a waiting period is not equivalent to a refusal of family reunification. The Council also submits that a waiting period is a classical element of immigration policy which exists in most Member States and has not been held unlawful by the competent courts. It pursues a legitimate objective of immigration policy, namely the effective integration of the members of the family in the host community, by ensuring that family reunification does not take place until the sponsor has found in the host State a solid base, both economic and domestic, for settling a family there.

94 The Council states that the difference in treatment among Member States is only the consequence of the process of gradual harmonisation of laws and that, contrary to the Parliament's assertions, Article 8 of the Directive harmonises Member State laws substantially, given the strict nature of the standstill clause that it contains.

95 It disputes that the reference in the second paragraph of Article 8 of the Directive to a Member State's reception capacity is the equivalent of a quota system. That criterion serves solely to identify the Member States which may extend the waiting period to three years.

Moreover, the Parliament's submissions on how that provision is implemented in the Member States are speculative.

96 According to the Commission, the waiting period introduced by Article 8 of the Directive is in the nature of a rule of administrative procedure which does not have the effect of excluding the right to reunification. Such a rule pursues a legitimate objective, and does so proportionately. The Commission states in this regard that the length of the period for which the sponsor has resided in the host Member State is an important factor taken into consideration in the case-law of the European Court of Human Rights in the weighing of the interests, as is the country's reception capacity. National legislation must in any event, as the Verfassungsgerichtshof has acknowledged, allow the possibility of submission of applications for reunification that are founded directly on Article 8 of the ECHR before the waiting period has expired.

Findings of the Court

97 Like the other provisions contested in the present action, Article 8 of the Directive authorises the Member States to derogate from the rules governing family reunification laid down by the Directive. The first paragraph of Article 8 authorises the Member States to require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members. The second paragraph of Article 8 authorises Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members.

98 That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.

99 It should, however, be remembered that, as is apparent from Article 17 of the Directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors.

100 The same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article 17 of the Directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application.

101 When carrying out that analysis, the Member States must, as is pointed out in paragraph 63 of the present judgment, also have due regard to the best interests of minor children.

102 The coexistence of different situations, according to whether or not Member States choose to make use of the possibility of imposing a waiting period of two years, or of three years where their legislation in force on the date of adoption of the Directive takes their reception capacity into account, merely reflects the difficulty of harmonising laws in a field which hitherto fell within the competence of the Member States alone. As the Parliament itself acknowledges, the Directive as a whole is important for applying the right to family reunification in a harmonised fashion. In the present instance, it does not appear that the Community legislature exceeded the limits imposed by fundamental rights in permitting Member States which had, or wished to adopt, specific legislation to adjust certain aspects of the right to reunification.

103 Consequently, Article 8 of the Directive cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

104 In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (see, to this effect, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22).

105 It should be remembered that, in accordance with settled case-law, the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case

C-107/97 *Rombi andArkopharma* [2000] ECR I-3367, paragraph 65; and, to this effect, *ERT*, paragraph 43).

106 Implementation of the Directive is subject to review by the national courts since, as provided in Article 18 thereof, 'the Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered'. If those courts encounter difficulties relating to the interpretation or validity of the Directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC.

107 So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987, the European Convention on the legal status of migrant workers of 24 November 1977 and bilateral and multilateral agreements between the Community or the Community and the Member States, on the one hand, and third countries, on the other.

108 Since the action is not well founded, there is no need to consider whether the contested provisions are severable from the rest of the Directive.

109 Consequently, the action must be dismissed.

Costs

110 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Parliament has been unsuccessful, the Parliament must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany and the Commission, which have intervened in the proceedings, are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the European Parliament to pay the costs;**

3. **Orders the Federal Republic of Germany and the Commission of the European Communities to bear their own costs.**

c) CJEU C-578/08, Chakroun, 4 March 2010

JUDGMENT OF THE COURT (Second Chamber)

4 March 2010 (*)

(Right to family reunification – Directive 2003/86/EC – Concept of 'recourse to the social assistance system' – Concept of 'family reunification' – Family formation)

In Case C-578/08,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Raad van State (Netherlands), made by decision of 23 December 2008, received at the Court on 29 December 2008, in the proceedings

Rhimou Chakroun

v

Minister van Buitenlandse Zaken,

THE COURT (Second Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(d) and 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12; 'the Directive').

2 The reference has been made in the course of proceedings between Mrs Chakroun and the Minister van Buitenlandse Zaken (Netherlands Minister for Foreign Affairs; 'the Minister') concerning the refusal to issue a provisional residence permit to Mrs Chakroun.

Legal context

European Union law

3 The Directive lays down the conditions for the exercise of the right to family reunification by third-country nationals who are lawfully resident in the territory of the Member States.

4 Recitals 2, 4 and 6 in the preamble to the Directive state as follows:

'(2) Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950; "the ECHR"] and in the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1; "the Charter")].

…

(4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.

…

(6) To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria'.

5 Article 2(a) to (d) of the Directive sets out the following definitions:

'For the purposes of this Directive:

(a) "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

(b) "refugee" means any third-country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967;

(c) "sponsor" means a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;

(d) "family reunification" means the entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry'.

6 Article 4(1)(a) of the Directive provides:

'The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse'.

7 Article 7(1) of the Directive provides:

'When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

8 Article 9(1) and (2) of the Directive provides:

'1. This Chapter shall apply to family reunification of refugees recognised by the Member States.

2. Member States may confine the application of this Chapter to refugees whose family relationships predate their entry.'

9 Article 17 of the Directive is worded as follows:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

10 Pursuant to its Article 20, the Directive was to be transposed by the Member States into their respective national laws by no later than 3 October 2005.

National law

11 Article 16(1)(c) of the Law on Aliens 2000 (Vreemdelingenwet 2000; 'the Vw 2000') provides:

'An application for a fixed-period residence permit may be refused if:

…

(c) the alien does not have independent, lasting and sufficient means of support, or the person with whom the alien wishes to reside does not have independent, lasting and sufficient means of support'.

12 Most of the provisions relevant to the main proceedings in the present case are to be found in the Decree on Aliens of 2000 (Vreemdelingenbesluit 2000; 'the Vb 2000'). That Decree was amended by Royal Decree of 29 September 2004 (*Staatsblad* 2004, p. 496) with a view to transposing the Directive.

13 Article 1.1(r) of the Vb 2000 defines family formation as 'family reunification of the spouses … in so far as the family relationship arose at a time when the principal place of residence of the principal person was the Netherlands'.

14 Article 3.13(1) of the Vb 2000 provides, so far as is relevant to the dispute in the main proceedings:

'A fixed-period residence permit … shall be granted, under the conditions for family reunification or family formation, to the member of the family … of the principal person …, if there is compliance with all the conditions laid down in Articles 3.16 to 3.22 inclusive.'

15 Article 3.22 of the Vb 2000 states as follows:

'1. The residence permit referred to in Article 3.13(1) shall be granted if the principal person:

(a) has a lasting and independent net income as defined in Article 3.74(a) …

…

2. In the case of family formation, the residence permit shall be granted, by derogation from Article 3.13(1), if the reference person has a lasting and independent net income which is equal to at least 120% of the minimum wage referred to in Article 8(1)(a) and Article 14 of the Law on the minimum wage and minimum holiday allowance [Wet minimumloon en minimumvakantie-bijslag], including the holiday allowance referred to in Article 15 of that law.'

16 Article 3.74(a) and (d) of the Vb 2000 provides:

'The means of support… are sufficient if the net income is equal to:

(a) the statutory assistance criteria, including holiday pay, referred to in Article 21 of the Law on work and assistance (Wet werk en bijstand; "the Wwb") for the relevant categories of single people, single parents or married couples and families …

…

(d) in the case of family formation: 120% of the minimum wage referred to in Article 8(1)(a) and Article 14 of the Law on the minimum wage and minimum holiday allowance, including the holiday allowance referred to in Article 15 of that law.'

17 It is apparent from the information provided by the Raad van State that, at the time taken into account for the purposes of the dispute in the main proceedings, the statutory assistance criterion determined in accordance with Article 21(c) of the Wwb for persons over 21 years of age and less than 65 years of age, in the case where both spouses were aged under 65, was

EUR 1 207.91 per month, while, in the case of family formation, the means of support were considered sufficient if the net income was equal to EUR 1 441.44 per month, including holiday allowance.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Mr Chakroun, who is of Moroccan nationality, was born on 1 July 1944. He has resided in the Netherlands since 21 December 1970 and there holds a residence permit for an indefinite period. Since 12 July 2005 he has been in receipt of unemployment benefit under the Law of 6 November 1986 on the insurance of workers against the financial consequences of unemployment (Wet tot verzekering van werknemers tegen geldelijke gevolgen van werkloosheid) which, if circumstances remain unchanged, will continue until 12 July 2010.

19 Mrs Chakroun, who also has Moroccan nationality, was born on 18 July 1948 and has been married to Mr Chakroun since 31 July 1972.

20 On 10 March 2006, Mrs Chakroun applied to the Netherlands Embassy in Rabat (Morocco) for a provisional residence permit in order to live with her husband.

21 By decision of 17 July 2006, the Minister refused that application on the ground that Mr Chakroun was not in receipt of sufficient income within the meaning of the Vb 2000. Mr Chakroun's unemployment benefit amounted to only EUR 1 322.73 net per month, inclusive of holiday allowance, and was therefore below the applicable income standard for family formation, which was EUR 1 441.44 per month.

22 By decision dated 21 February 2007, the Minister declared the objection lodged by Mrs Chakroun against that decision to be unfounded.

23 By a decision of 15 October 2007, the Rechtbank 's-Gravenhage (District Court, The Hague) declared unfounded the appeal which Mrs Chakroun then brought against that decision of 21 February 2007. Mrs Chakroun subsequently brought an appeal against that decision before the Raad van State.

24 Before the Raad van State, Mrs Chakroun primarily raises the question whether Article 7(1)(c) of the Directive has been correctly implemented in Article 3.74(d) and Article 3.22(2) of the Vb 2000, inasmuch as those provisions require the sponsor, in cases of family formation, to have resources equivalent to 120% of the minimum wage.

25 The Raad van State explains that the minimum wage is an essential reference criterion in the Wwb, the objective of which is to guarantee a minimum standard of living for all Netherlands nationals residing in the Netherlands and for all aliens residing in the Netherlands and equated with Netherlands nationals whose circumstances are, or threaten to become, such that they do not have the resources to meet essential living costs (Article 11 of the Wwb). Application of that law falls within the powers of the local authorities.

26 The Wwb provides for two categories of assistance. In the first place, there is general assistance, by which is meant assistance in meeting essential living costs (Article 5(b) of the Wwb). In the second place, the Law provides for special assistance, to which the persons concerned are entitled in so far as they do not have at their disposal sufficient resources to cover essential living expenses arising from exceptional circumstances and in so far as, in the opinion of the local authority, those expenses cannot be met by other available means (Article 35(1) of the Wwb).

27 The minimum wage of a person aged 23 is used by the Wwb as a reference criterion to determine need and the amount to which a person is entitled in respect of general assistance. The amount corresponding to 120% of the minimum wage is, as the Netherlands Government points out in its observations, the amount above which a resident is no longer entitled to general or special assistance.

28 The Raad van State asks whether, when implementing Article 7(1)(c) of the Directive, the Member States may or must take account, whether or not at a fixed rate, of social benefits in the form of special assistance. Granted by the local authority after examination of the applicant's situation, special assistance may take a variety of forms, including a tax refund.

29 Secondly, Mrs Chakroun challenges the distinction drawn by Netherlands law between family reunification and family formation, a distinction based on whether the family relationship arose before or after the sponsor's entry into the Netherlands, even though no such distinction is drawn in Article 7(1) of the Directive. If the application at issue in the main proceedings had been treated as an application for family reunification within the meaning of the Netherlands legislation, the assistance standard referred to in Article 21(c) of the Wwb would have been taken into consideration, in accordance with Article 3.74(a) of the Vb 2000, with the result that Mr Chakroun's resources would have been greater than the required amount.

30 The Raad van State is unsure as to whether it is possible for Member States to distinguish in this way between family formation and family reunification, but states that it is possible that

the Directive does not preclude legislation which draws a distinction on the basis of whether the family relationship arose before or after the date of the sponsor's entry into the host Member State. The Raad van State notes that that distinction is provided for in Article 9 of the Directive, which applies to refugees, and in Article 16(1) and (5) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

31 Having regard to the foregoing, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Should the phrase "recourse to the social assistance system" in Article 7(1)(c) of [the Directive] be interpreted as permitting a Member State to make an arrangement in respect of family reunification which results in family reunification not being granted to a sponsor who has provided evidence of having stable and regular resources to meet general subsistence costs, but who, given the level of such resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, income-related remission of charges by municipal authorities, or income-support measures in the context of municipal minimum income policies ["minimabeleid"]?

2. Should [the Directive], in particular Article 2(d), be interpreted as precluding national legislation which, in applying the resource requirement pursuant to Article 7(1)(c), makes a distinction according to whether a family relationship arose before or after the entry of the resident into the Member State?'

The questions referred

The first question

32 By its first question, the Raad van State asks whether the phrase 'recourse to the social assistance system' in Article 7(1)(c) of the Directive is to be interpreted as permitting a Member State to adopt rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living expenses, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minima-beleid').

Observations submitted by the parties

33 Mrs Chakroun submits that the 'the social assistance system of the Member State concerned', referred to in Article 7(1)(c) of the Directive, can refer only to rules at national level, whereas a number of the rules mentioned by the Raad van State are instituted at local level. She also submits that the reference in Article 7(1)(c) of the Directive to the level of minimum national wages and pensions means that that level constitutes an upper limit.

34 Mrs Chakroun, in the same way as the Commission of the European Communities, submits that the discretion left to the Member States in implementing the Directive must not adversely affect its objectives or effectiveness. She explains in particular that the standard of 120% of the minimum wage, as laid down, has the effect that young applicants will almost never be able to meet the criterion of means of support on the basis of full-time employment. The Law takes as its reference criterion the minimum wage of persons aged 23. The minimum wage of persons under 23 years of age is, however, only a fraction of that of persons who are 23, that is to say, for example, 72% for a person aged 21, with the result that a person of 21 years of age would have to earn 160% of the minimum wage for his age group in order to satisfy the criterion.

35 At the hearing, Mrs Chakroun cited the report drawn up by the Wetenschappelijk Onderzoek- en Documentatiecentrum (Scientific Research and Documentation Centre) of the Netherlands Ministry of Justice evaluating the effect, on the migration of foreign spouses to the Netherlands, of the increase in income required for purposes of family reunification. In Mrs Chakroun's submission, the negative aspects described in that report demonstrate that the Netherlands rules run counter to the objective of the Directive.

36 The Commission states that the determining factor, according to the Directive, is whether the person concerned himself has sufficient resources to meet his basic needs without recourse to social assistance. The system laid down by the Directive should not be understood as allowing Member States to total up all the social benefits which the person concerned could claim in order to fix the threshold of required income on that basis.

37 The Commission points out in that regard that, as is stated in point 4.3.3 of its report of 8 October 2008 to the European Parliament and the Council on the application of Directive 2003/86 (COM(2008) 610), the amount required by the Netherlands authorities for evaluation of the sufficiency of resources is the highest of all the Member States of the European Union. In addition, it notes that if, in the main proceedings, the family relationship between the Chakrouns had existed before Mr Chakroun's entry into the territory of the Union, the amount of income

taken into consideration for evaluation of the sufficiency of resources would have been lower than that applied in those proceedings under Article 3.74(d) of the Vb 2000. The view can therefore be taken that the amount required by the national rules in the case where the family relationship existed before the entry of the sponsor into the territory of the Union corresponds to the amount which is normally sufficient to meet the most basic needs in Netherlands society.

38 Finally, both Mrs Chakroun and the Commission consider that, in the main proceedings, the Netherlands authorities ought to have taken account of the long duration of the residence and of the marriage and that, by omitting to do so, they disregarded the requirement of individual examination of the application laid down in Article 17 of the Directive.

39 The Netherlands Government contends that the level of sufficient income, set at 120% of the statutory minimum wage, is the amount of income generally used by local authorities in the Netherlands as one of the criteria for identifying potential beneficiaries of a general or special measure of social assistance. However, certain local authorities opt for different levels of income, ranging from 110% to 130% of the statutory minimum wage. Since social assistance is granted on the basis of need, it is only after the event that statistics can be compiled which make it possible to determine the average ceiling of income at which that assistance has been granted.

40 The Netherlands Government thus submits that the level of income corresponding to 120% of the statutory minimum wage is in accordance with Article 7(1)(c) of the Directive, since it is the level of income above which, in principle, it is no longer possible to have recourse to a general or special measure of social assistance. It also argues that the level of minimum wage in the Netherlands enables only essential needs to be met; this can prove to be insufficient to meet exceptional individual expenses. Those factors, it argues, justify the taking into account of an income level equivalent to 120% of the statutory minimum wage.

The Court's answer

41 Article 4(1) of the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation (Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 60).

42 However, that provision is subject to compliance with the conditions referred to, in particular, in Chapter IV of the Directive. Article 7(1)(c) of the Directive forms part of those conditions and allows Member States to require evidence that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the Member State concerned. That provision also states that Member States are to evaluate those resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.

43 Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

44 In that regard, it follows from recital 2 in the preamble to the Directive that measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. The Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter. It follows that the provisions of the Directive, particularly Article 7(1)(c) thereof, must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. It should be added that, under the first subparagraph of Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter, as adapted at Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1), which has the same legal value as the Treaties.

45 As Mrs Chakroun pointed out at the hearing, the concept of 'social assistance system of the Member State' is a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law. In the light, in particular, of the differences existing between the Member States in the management of social assistance, that concept must be understood as referring to social assistance granted by the public authorities, whether at national, regional or local level.

46 The first sentence of Article 7(1)(c) of the Directive sets up, on the one hand, the concept of 'stable and regular resources which are sufficient to maintain [the applicant]' against, on the other, that of 'social assistance'. It follows from this contrast that the concept of 'social assistance' in the Directive refers to assistance granted by the public authorities, whether at national, regional or local level, which can be claimed by an individual, in this case the sponsor, who does not have stable and regular resources which are sufficient to maintain himself and the

members of his family and who, by reason of that fact, is likely to become a burden on the social assistance system of the host Member State during his period of residence (see, by way of analogy, Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 29).

47 The second sentence of Article 7(1)(c) of the Directive allows Member States to take into account the level of minimum national wages and pensions as well as the number of family members when evaluating the sponsor's resources. As has been pointed out in paragraph 43 of the present judgment, that faculty must be exercised in a manner which avoids undermining the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.

48 Since the extent of needs can vary greatly depending on the individuals, that authorisation must, moreover, be interpreted as meaning that the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant. That interpretation is supported by Article 17 of the Directive, which requires individual examination of applications for family reunification.

49 To use as a reference amount a level of income equivalent to 120% of the minimum income of a worker aged 23, above which amount special assistance cannot, in principle, be claimed, does not appear to meet the objective of determining whether an individual has stable and regular resources which are sufficient for his own maintenance. The concept of 'social assistance' in Article 7(1)(c) of the Directive must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed.

50 Furthermore, the figure of 120% used to set the amount required by the Vb 2000 is merely an average figure, determined when the statistics on special assistance granted by the local authorities in the Netherlands and the income criteria taken into account by them are drawn up. As was stated at the hearing, some local authorities use as their reference amount an income which is lower than that corresponding to 120% of the minimum wage, which contradicts the assertion that income corresponding to 120% of the minimum wage is essential.

51 Finally, it is not for the Court to determine whether the minimum income required by Netherlands legislation is sufficient to enable workers of that State to meet their everyday needs. However, it is sufficient to note, as has been rightly contended by the Commission, that if, in the main proceedings, the family relationship between the Chakrouns had existed before Mr Chakroun's entry into the territory of the Union, the amount of income taken into consideration in the examination of Mrs Chakroun's application would have been the minimum wage and not 120% thereof. The conclusion must therefore be that the minimum wage is regarded by the Netherlands authorities themselves as corresponding to resources which are sufficient for the purposes of Article 7(1)(c) of the Directive.

52 Having regard to those factors, the answer to the first question is that the phrase 'recourse to the social assistance system' in Article 7(1)(c) of the Directive must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid').

The second question

53 By its second question, the national court asks whether the Directive, in particular Article 2(d) thereof, is to be interpreted as precluding national legislation which, in applying the income requirement pursuant to Article 7(1)(c) of the Directive, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

Observations submitted by the parties

54 Mrs Chakroun explains that, immediately upon his arrival in the Netherlands in 1970, her husband worked for two years in that Member State in order to earn the money required for them to marry.

55 In the view of Mrs Chakroun and the Commission, the Directive provides no basis for a distinction between preserving a family and establishing one. It is apparent from, inter alia, a Council Presidency document (Council Document 5682/01 of 31 January 2001, p. 3) that there was broad agreement that family reunification should cover both formation and preservation of the family unit. That interpretation, it is submitted, is supported by recital 6 in the preamble to the Directive and by Article 2(d) thereof. As regards the exception introduced by Article 9(2) of the Directive, it is argued that this is a provision specific to the situation of refugees obliged to flee their country. In addition, Mrs Chakroun cites the report published on 11 March 2009 by the

Council of Europe Commissioner for Human Rights on his visit to the Netherlands between 21 and 25 September 2008, in which the Commissioner expresses surprise at certain provisions in the Netherlands legislation concerning family reunification.

56 The Commission also asks how a distinction based on the time at which the family relationship arose can have the slightest connection with the requirement to meet the substantive conditions relating to basic needs.

57 The Netherlands Government asserts that the distinction which the national legislation draws between establishment of a family and family reunification is not prohibited by the Directive and is one way in which account may be taken of the nature and solidity of family ties, as required by Article 17 of the Directive. The Netherlands Government argues that it is possible to imagine that the interests at stake will be greater in the case where the family relationship already existed before the principal person became resident in the Netherlands. In the case of family formation, the two partners assume the risk that it may not be possible, temporarily, for their family life to take place in the Netherlands. As a general rule, the family relationship is less intense in such cases than in those which subsequently give rise to applications for family reunification. It is precisely in order to protect the family that the Kingdom of the Netherlands has set, as the level of sufficient income, an amount lower than the general norm of 120% of the minimum wage in respect of applications for family reunification.

58 For the sake of completeness, the Netherlands Government observes that, even where the family relationship arose after the arrival of the principal person in the Netherlands, and the income condition is not met, residence of the family members will nevertheless be permitted if Article 8 of the ECHR so requires.

The Court's answer

59 Article 2(d) of the Directive defines family reunification without drawing any distinction based on the time of marriage of the spouses, since it states that that reunification must be understood as meaning the entry into and residence in the host Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, 'whether the family relationship arose before or after the resident's entry'.

60 Only Article 9(2) of the Directive, which applies to refugees, provides that 'Member States may confine the application of [the provisions of Chapter V of the Directive] to refugees whose family relationships predate their entry'. That provision is explained by the more favourable treatment granted to refugees on their arrival in the territory.

61 It follows that the rules contained in the Directive, with the exception of Article 9(2) thereof, apply both to what the Netherlands legislation refers to as family reunification and to what it defines as family formation.

62 That interpretation is supported by recital 6 in the preamble to the Directive, which seeks to 'protect the family and establish or preserve family life'. It is also supported by the *travaux préparatoires* cited by Mrs Chakroun, from which it is apparent that there was broad agreement that family reunification should cover both family formation and preservation of the family unit.

63 Furthermore, that interpretation is consistent with Article 8 of the ECHR and Article 7 of the Charter, which do not draw any distinction based on the circumstances in and time at which a family is constituted.

64 Having regard to that lack of distinction, intended by the European Union legislature, based on the time at which the family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive (see, by way of analogy, Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 93). Furthermore, the capacity of a sponsor to have regular resources which are sufficient to maintain himself and the members of his family within the meaning of Article 7(1)(c) of the Directive cannot in any way depend on the point in time at which he constitutes his family.

65 Finally, with regard to the Netherlands Government's argument that authorisation should be granted if so required by Article 8 of the ECHR, suffice it to note that, as emerged at the hearing, Mrs Chakroun has still not been authorised to join her husband, to whom she has been married for 37 years.

66 Accordingly, the answer to the second question referred is that the Directive, in particular Article 2(d) thereof, must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c) of the Directive, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The phrase 'recourse to the social assistance system' in Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid').**

2. **Directive 2003/86, in particular Article 2(d) thereof, must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c) of Directive 2003/86, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.**

C. Student and Researcher Migration

1. Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service

2. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research

D. Labour Migration

1. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

2. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State

E. Long Term Residents

1. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

IV. Forced Migration

A. Asylum

1. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

a) ECtHR 21 January 2011, M.S.S. v. Belgium and Greece

In the case of M.S.S. v. Belgium and Greece,

The European Court of Human Rights, sitting as a Grand Chamber composed of: (…)

Having deliberated in private on 1 September and 15 December 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30696/09) against the Kingdom of Belgium and the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr M.S.S. ("the applicant"), on 11 June 2009. The President of the Chamber to which the case had been assigned acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2.-8. (…)

FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Entry into the European Union

9. The applicant left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece, where his fingerprints were taken on 7 December 2008 in Mytilene.

10. He was detained for a week and, when released, was issued with an order to leave the country. He did not apply for asylum in Greece.

B. Asylum procedure and expulsion procedure in Belgium

11. On 10 February 2009, after transiting through France, the applicant arrived in Belgium, where he presented himself to the Aliens Office with no identity documents and applied for asylum.

12. The examination and comparison of the applicant's fingerprints generated a Eurodac "hit" report on 10 February 2009 revealing that the applicant had been registered in Greece.

13. The applicant was placed initially in the Lanaken open reception centre for asylum seekers.

14. On 18 March 2009, by virtue of Article 10 § 1 of Regulation no. 343/2003/EC (the Dublin Regulation, see paragraphs 65-82 below), the Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. When the Greek authorities failed to respond within the two-month period provided for in Article 18 § 1 of the Regulation, the Aliens Office considered this to be a tacit acceptance of the request to take charge of the application, pursuant to paragraph 7 of that provision.

15. During his interview under the Dublin Regulation on 18 March 2009 the applicant told the Aliens Office that he had fled Afghanistan with the help of a smuggler he had paid 12,000 dollars and who had taken his identity papers. He said he had chosen Belgium after meeting some Belgian North Atlantic Treaty Organisation (NATO) soldiers who had seemed very friendly. He also requested that the Belgian authorities examine his fears. He told them he had a sister in the

Netherlands with whom he had lost contact. He also mentioned that he had had hepatitis B and had been treated for eight months.

16. On 2 April 2009, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece (see paragraphs 194 and 195, below). A copy was sent to the Aliens Office.

17. On 19 May 2009, in application of section 51/5 of the Act of 15 December 1980 on the entry, residence, settlement and expulsion of aliens ("the Aliens Act"), the Aliens Office decided not to allow the applicant to stay and issued an order directing him to leave the country. The reasons given for the order were that, according to the Dublin Regulation, Belgium was not responsible for examining the asylum application; Greece was responsible and there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters under Community law and the 1951 Geneva Convention relating to the Status of Refugees. That being so, the applicant had the guarantee that he would be able, as soon as he arrived in Greece, to submit an application for asylum, which would be examined in conformity with the relevant rules and regulations. The Belgian authorities were under no obligation to apply the derogation clause provided for in Article 3 § 2 of the Regulation. Lastly, the applicant suffered from no health problem that might prevent his transfer and had no relatives in Belgium.

18. On the same day the applicant was taken into custody with a view to the enforcement of that decision and placed in closed facility 127 bis for illegal aliens, in Steenokkerzeel.

19. On 26 May 2009 the Belgian Committee for Aid to Refugees, the UNHCR's operational partner in Belgium, was apprised of the contact details of the lawyer assigned to the applicant.

20. On 27 May 2009 the Aliens Office scheduled his departure for 29 May 2009.

21. At 10.25 a.m. on the appointed day, in Tongres, the applicant's initial counsel lodged an appeal by fax with the Aliens Appeals Board to have the order to leave the country set aside, together with a request for a stay of execution under the extremely urgent procedure. The reasons given, based in particular on Article 3 of the Convention, referred to a risk of arbitrary detention in Greece in appalling conditions, including a risk of ill-treatment. The applicant also relied on the deficiencies in the asylum procedure in Greece, the lack of effective access to judicial proceedings and his fear of being sent back to Afghanistan without any examination of his reasons for having fled that country.

22. The hearing was scheduled for the same day, at 11.30 a.m., at the seat of the Aliens Appeals Board in Brussels. The applicant's counsel did not attend the hearing and the application for a stay of execution was rejected on the same day, for failure to attend.

23. The applicant refused to board the aircraft on 29 May 2009 and his renewed detention was ordered under section 27, paragraph 1, of the Aliens Act.

24. On 4 June 2009 the Greek authorities sent a standard document confirming that it was their responsibility under Articles 18 § 7 and 10 § 1 of the Dublin Regulation to examine the applicant's asylum request. The document ended with the following sentence: "Please note that if he so wishes this person may submit an application [for asylum] when he arrives in Greece."

25. On 9 June 2009 the applicant's detention was upheld by order of the *chambre du conseil* of the Brussels Court of First Instance.

26. On appeal on 10 June, the Indictments Chamber of the Brussels Court of Appeal scheduled a hearing for 22 June 2009.

27. Notified on 11 June 2009 that his departure was scheduled for 15 June, the applicant lodged a second request, through his current lawyer, with the Aliens Appeals Board to set aside the order to leave the territory. He relied on the risks he would face in Afghanistan and those he would face if transferred to Greece because of the slim chances of his application for asylum being properly examined and the appalling conditions of detention and reception of asylum seekers in Greece.

28. A second transfer was arranged on 15 June 2009, this time under escort.

29. By two judgments of 3 and 10 September 2009, the Aliens Appeals Board rejected the applications for the order to leave the country to be set aside – the first because the applicant had not filed a request for the proceedings to be continued within the requisite fifteen days of service of the judgment rejecting the request for a stay of execution lodged under the extremely urgent procedure, and the second on the ground that the applicant had not filed a memorial in reply.

30. No administrative appeal on points of law was lodged with the *Conseil d'Etat*.

C. Request for interim measures against Belgium

31. In the meantime, on 11 June 2009, the applicant applied to the Court, through his counsel, to have his transfer to Greece suspended. In addition to the risks he faced in Greece, he claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul. In support of his assertions, he produced certificates confirming that he had worked as an interpreter.

32. On 12 June 2009 the Court refused to apply Rule 39 but informed the Greek Government that its decision was based on its confidence that Greece would honour its obligations under the Convention and comply with EU legislation on asylum. The letter sent to the Greek Government read as follows:

> "That decision was based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention. The Section also expressed its confidence that your Government would comply with their obligations under the following:
>
> - the Dublin Regulation referred to above;
>
> - Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and
>
> - Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
>
> I should be grateful therefore if your Government would undertake to inform the Court of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he is detained on arrival in Greece."

D. Indication of interim measures against Greece

33. On 15 June 2009 the applicant was transferred to Greece. On arriving at Athens international airport he gave his name as that used in the agreement to take responsibility issued by the Greek authorities on 4 June 2009.

34. On 19 June 2009 the applicant's lawyer received a first text message (sms), in respect of which he informed the Court. It stated that upon arrival the applicant had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.

35. When released on 18 June 2009, he was given an asylum seeker's card ("pink card", see paragraph 89 below). At the same time the police issued him with the following notification (translation provided by the Greek Government):

> "In Spata, on 18.06.2009 at 12.58 p.m., I, the undersigned police officer [...], notified the Afghan national [...], born on [...], of no registered address, that he must report within two days to the Aliens Directorate of the Attica Police Asylum Department to declare his home address in Greece so that he can be informed of progress with his asylum application."

36. The applicant did not report to the Attica police headquarters on Petrou Ralli Avenue in Athens (hereafter "the Attica police headquarters").

37. Having no means of subsistence, the applicant went to live in a park in central Athens where other Afghan asylum seekers had assembled.

38. Having been informed of the situation on 22 June 2009, the Registrar of the Second Section sent a further letter to the Greek Government which read as follows:

> "I should be obliged if your Government would inform the Court of the current situation of the applicant, especially concerning his possibilities to make an effective request for asylum. Further, the Court should be informed about the measures your Government intend to take regarding:
>
> a) the applicant's deportation;

b) the means to be put at the applicant's disposal for his subsistence."

39. The Greek authorities were given until 29 June 2009 to provide this information, it being specified that: "Should you not reply to our letter within the deadline, the Court will seriously consider applying Rule 39 against Greece."

40. On 2 July 2009, having regard to the growing insecurity in Afghanistan, the plausibility of the applicant's story concerning the risks he had faced and would still face if he were sent back to that country and the lack of any reaction on the part of the Greek authorities, the Court decided to apply Rule 39 and indicate to the Greek Government, in the parties' interest and that of the smooth conduct of the proceedings, not to have the applicant deported pending the outcome of the proceedings before the Court.

41. On 23 July 2009 the Greek Government informed the Court, in reply to its letter of 22 June 2009, that on arriving at Athens airport on 15 June 2009 the applicant had applied for asylum and the asylum procedure had been set in motion. The Government added that the applicant had then failed to go to the Attica police headquarters within the two-day time-limit to fill in the asylum application and give them his address.

42. In the meantime the applicant's counsel kept the Court informed of his exchanges with the applicant. He confirmed that he had applied for asylum at the airport and had been told to go to the Attica police headquarters to give them his address for correspondence in the proceedings. He had not gone, however, as he had no address to give them.

E. Subsequent events

43. On 1 August 2009, as he was attempting to leave Greece, the applicant was arrested at the airport in possession of a false Bulgarian identity card.

44. He was placed in detention for seven days in the same building next to the airport where he had been detained previously. In a text message to his counsel he described his conditions of detention, alleging that he had been beaten by the police officers in charge of the centre, and said that he wanted to get out of Greece at any cost so as not to have to live in such difficult conditions.

45. On 3 August 2009 he was sentenced by the Athens Criminal Court to two months' imprisonment, suspended for three years, for attempting to leave the country with false papers.

46. On 4 August 2009, the Ministry of Public Order (now the Ministry of Civil Protection) adopted an order stipulating that in application of section 76 of Law no. 3386/2005 on the entry, residence and social integration of third-country nationals in Greece, the applicant was the subject of an administrative expulsion procedure. It further stipulated that the applicant could be released as he was not suspected of intending to abscond and was not a threat to public order.

47. On 18 December 2009 the applicant went to the Attica police headquarters, where they renewed his pink card for six months. In a letter on the same day the police took note in writing that the applicant had informed them that he had nowhere to live, and asked the Ministry of Health and Social Solidarity to help find him a home.

48. On 20 January 2010 the decision to expel the applicant was automatically revoked by the Greek authorities because the applicant had made an application for asylum prior to his arrest.

49. In a letter dated 26 January 2010 the Ministry of Health and Social Solidarity informed the State Legal Council that, because of strong demand, the search for accommodation for the applicant had been delayed, but that something had been found; in the absence of an address where he could be contacted, however, it had not been possible to inform the applicant.

50. On 18 June 2010 the applicant went to the Attica police headquarters, where his pink card was renewed for six months.

51. On 21 June 2010 the applicant received a notice in Greek, which he signed in the presence of an interpreter, inviting him to an interview at the Attica police headquarters on 2 July 2010. The applicant did not attend the interview.

52. Contacted by his counsel after the hearing before the Court, the applicant informed him that the notice had been handed to him in Greek when his pink card had been renewed and that the interpreter had made no mention of any date for an interview.

53. In a text message to his counsel dated 1 September 2010 the applicant informed him that he had once again attempted to leave Greece for Italy, where he had heard reception conditions were more decent and he would not have to live on the street. He was stopped by the police in Patras and taken to Salonika, then to the Turkish border for expulsion there. At the last moment, the Greek police decided not to expel him, according to the applicant because of the presence of the Turkish police.

II. RELEVANT INTERNATIONAL AND EUROPEAN LAW

A. The 1951 Geneva Convention relating to the Status of Refugees

54. Belgium and Greece have ratified the 1951 Geneva Convention relating to the Status of Refugees ("the Geneva Convention"), which defines the circumstances in which a State must grant refugee status to those who request it, as well as the rights and duties of such persons.

55. In the present case, the central Article is Article 33 § 1 of the Geneva Convention, which reads as follows:

> "1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

56. In its note of 13 September 2001 on international protection (A/AC.96/951, § 16), the UNHCR, whose task it is to oversee how the States Parties apply the Geneva Convention, stated that the principle of "*non-refoulement*" was:

> "a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx."

B. Community law

1. The Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

57. Fundamental rights, as guaranteed by the Convention, are part of European Union law and are recognised in these terms:

Article 2

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities..."

Article 6

> "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> ...
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

2. The Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

58. The issues of particular relevance to the present judgment are covered by Title V – Area of Freedom, Security and Justice – of Part Three of the Treaty on the Functioning of the European Union on Union Policies and internal action of the Union. In Chapter 1 of this Title, Article 67 stipulates:

> "1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
>
> 2. It ... shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. ..."

59. The second chapter of Title V concerns "policies on border checks, asylum and immigration". Article 78 § 1 stipulates:

> "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention ... and other relevant treaties."

60. Article 78 § 2 provides, *inter alia*, for the Union's legislative bodies to adopt a uniform status of asylum and subsidiary protection, as well as criteria and mechanisms for determining which Member State is responsible for considering an application for asylum.

3. The Charter of Fundamental Rights of the European Union

61. The Charter of Fundamental Rights, which has been part of the primary law of the European Union since the entry into force of the Treaty of Lisbon, contains an express provision guaranteeing the right to asylum, as follows:

Article 18 – Right to asylum

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

4. The "Dublin" asylum system

62. Since the European Council of Tampere in 1999, the European Union has organised the implementation of a common European asylum system.

63. The first phase (1999-2004) saw the adoption of several legal instruments setting minimum common standards in the fields of the reception of asylum seekers, asylum procedures and the conditions to be met in order to be recognised as being in need of international protection, as well as rules for determining which Member State is responsible for examining an application for asylum ("the Dublin system").

64. The second phase is currently under way. The aim is to further harmonise and improve protection standards with a view to introducing a common European asylum system by 2012. The Commission announced certain proposals in its policy plan on asylum of 17 June 2008 (COM(2008) 360).

(a) The Dublin Regulation and the Eurodac Regulation

65. Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation") applies to the Member States of the European Union and to Norway, Iceland and Switzerland.

66. The Regulation replaces the provisions of the Dublin Convention for determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed on 15 June 1990.

67. An additional regulation, Regulation no. 1560/2003 of 2 September 2003, lays down rules for the application of the Dublin Regulation.

68. The first recital of the Dublin Regulation states that it is part of a common policy on asylum aimed at progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

69. The second recital affirms that the Regulation is based on the presumption that the member States respect the principle of *non-refoulement* enshrined in the Geneva Convention and are considered as safe countries.

70. Under the Regulation, the Member States must determine, based on a hierarchy of objective criteria (Articles 5 to 14), which Member State bears responsibility for examining an asylum application lodged on their territory. The aim is to avoid multiple applications and to guarantee that each asylum seeker's case is dealt with by a single Member State.

71. Where it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is responsible for examining the application for asylum (Article 10 § 1). This responsibility ceases twelve months after the date on which the irregular border crossing took place.

72. Where the criteria in the regulation indicate that another Member State is responsible, that State is requested to take charge of the asylum seeker and examine the application for asylum. The requested State must answer the request within two months from the date of receipt

of that request. Failure to reply within two months is stipulated to mean that the request to take charge of the person has been accepted (Articles 17 and 18 §§ 1 and 7).

73. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged must notify the applicant of the decision to transfer him or her, stating the reasons. The transfer must be carried out at the latest within six months of acceptance of the request to take charge. Where the transfer does not take place within that time-limit, responsibility for processing the application lies with the Member State in which the application for asylum was lodged (Article 19).

74. By way of derogation from the general rule, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation (Article 3 § 2). This is called the "sovereignty" clause. In such cases the State concerned becomes the Member State responsible and assumes the obligations associated with that responsibility.

75. Furthermore, any Member State, even where it is not responsible under the criteria set out in the Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations (Article 15 § 1). This is known as the "humanitarian" clause. In this case that Member State will, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

76. Another Council Regulation, no. 2725/2000 of 11 December 2000, provides for the establishment of the Eurodac system for the comparison of fingerprints ("the Eurodac Regulation"). It requires the States to register asylum seekers' fingerprints. The data is transmitted to Eurodac's central unit, run by the European Commission, which stores it in its central database and compares it with the data already stored there.

77. On 6 June 2007 the European Commission transmitted a report to the European Parliament and the Council on the evaluation of the Dublin system (COM(2007)299 final). On 3 December 2008 it made public its proposal for a recasting of the Dublin Regulation (COM(2008) 820 final/2). The purpose of the reform is to improve the efficiency of the system and ensure that all the needs of persons seeking international protection are covered by the procedure for determining responsibility.

78. The proposal aims to set in place a mechanism for suspending transfers under the Dublin system, so that, on the one hand, member States whose asylum systems are already under particularly heavy pressure are not placed under even more pressure by such transfers and, on the other hand, asylum seekers are not transferred to Member States which cannot offer them a sufficient level of protection, particularly in terms of reception conditions and access to the asylum procedure (Article 31 of the proposal). The State concerned must apply to the European Commission for a decision. The transfers may be suspended for up to six months. The Commission may extend the suspension for a further six months at its own initiative or at the request of the State concerned.

79. The proposal, examined under the codecision procedure, was adopted by the European Parliament at first reading on 7 May 2009 and submitted to the Commission and the Council.

80. At the Informal Justice and Home Affairs Council meeting in Brussels on 15 and 16 July 2010, the Belgian Presidency of the Council of the European Union placed on the agenda an exchange of views on the means of arriving at a single asylum procedure and a uniform standard of international protection by 2012. Discussion focused in particular on what priority the Council should give to negotiations on the recasting of the Dublin Regulation and on whether the ministers would back the inclusion of the temporary suspension clause.

81. The Court of Justice of the European Communities (CJEC), which became the Court of Justice of the European Union (CJEU) upon the entry into force of the Treaty of Lisbon, has delivered one judgment concerning the Dublin Regulation. In the *Petrosian* case (C-19/08, judgment of 29 January 2009) it was asked to clarify the interpretation of Article 20 §§ 1 and 2 concerning the taking of responsibility for an asylum application and the calculation of the deadline for making the transfer when the legislation of the requesting Member State provided for appeals to have suspensive effect. The CJEU found that time started to run from the time of the decision on the merits of the request.

82. The CJEU has recently received a request from the Court of Appeal (United Kingdom) for a preliminary ruling on the interpretation to be given to the sovereignty clause in the Dublin Regulation (case of *N.S.*, C-411/10).

(b) The European Union's directives on asylum matters

83. Three other European texts supplement the Dublin Regulation.

84. *Directive 2003/9 of 27 January 2003, laying down minimum standards for the reception of asylum seekers in the Member States* ("the Reception Directive"), entered into force on the day of

its publication in the Official Journal (OJ L 31 of 6.2.2003). It requires the States to guarantee asylum seekers:

- certain material reception conditions, including accommodation; food and clothing, in kind or in the form of monetary allowances; the allowances must be sufficient to protect the asylum seeker from extreme need;

- arrangements to protect family unity;

- medical and psychological care;

- access for minors to education, and to language classes when necessary for them to undergo normal schooling.

In 2007 the European Commission asked the CJEC (now the CJEU) to examine whether Greece was fulfilling its obligations concerning the reception of refugees. In a judgment of 19 April 2007 (case C-72/06), the CJEC found that Greece had failed to fulfil its obligations under the Reception Directive. The Greek authorities subsequently transposed the Reception Directive.

On 3 November 2009 the European Commission sent a letter to Greece announcing that it was bringing new proceedings against it.

85. *Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status in the Member States* (the "Procedures Directive"), which entered into force on the day of its publication in the Official Journal (OJ L 326/13 of 13.12.2005), guarantees the following rights:

- an application for asylum cannot be rejected on the sole ground that it has not been made as soon as possible. In addition, applications must be examined individually, objectively and impartially;

- asylum applicants have the right to remain in the Member State pending the examination of their applications;

- the Member States are required to ensure that decisions on applications for asylum are given in writing and that, where an application is rejected, the reasons are stated in the decision and information on how to challenge a negative decision is given in writing;

- asylum seekers must be informed of the procedure to be followed, of their rights and obligations, and of the result of the decision taken by the determining authority;

- asylum seekers must receive the services of an interpreter for submitting their case to the competent authorities whenever necessary;

- asylum seekers must not be denied the opportunity to communicate with the UNHCR. More generally, the Member States must allow the UNHCR to have access to asylum applicants, including those in detention, as well as to information on asylum applications and procedures, and to present its views to any competent authority;

- applicants for asylum must have the opportunity, at their own cost, to consult a legal adviser in an effective manner. In the event of a negative decision by a determining authority, Member States must ensure that free legal assistance is granted on request. This right may be subject to restrictions (choice of counsel restricted to legal advisers specifically designated by national law, appeals limited to those likely to succeed, or free legal aid limited to applicants who lack sufficient resources).

The European Commission initiated proceedings against Greece in February 2006 for failure to honour its obligations, because of the procedural deficiencies in the Greek asylum system, and brought the case before the CJEC (now the CJEU). Following the transposition of the Procedures Directive into Greek law in July 2008, the case was struck out of the list.

On 24 June 2010 the European Commission brought proceedings against Belgium in the CJEU on the grounds that the Belgian authorities had not fully transposed the Procedures Directive – in particular, the minimum obligations concerning the holding of personal interviews.

In its proposal for recasting the Procedures Directive, presented on 21 October 2009 (COM(2009) 554 final), the Commission contemplated strengthening the obligation to inform the applicant. It also provided for a full and ex nunc review of first-instance decisions by a court or tribunal and specified that the notion of effective remedy required a review of both facts and points of law. It further introduced provisions to give appeals automatic suspensive effect. The proposed amendments were intended to improve consistency with the evolving case-law regarding such principles as the right to defence, equality of arms, and the right to effective judicial protection.

86. *Directive 2004/83 of 29 April 2004 concerns minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise*

need international protection and the content of the protection granted ("the Qualification Directive"). It entered into force 20 days after it was published in the Official Journal (OJ L 304 of 30.09.2004).

This Directive contains a set of criteria for granting refugee or subsidiary protection status and laying down the rights attached to each status. It introduces a harmonised system of temporary protection for persons not covered by the Geneva Convention but who nevertheless need international protection, such as victims of widespread violence or civil war.

The CJEC (now the CJEU) has delivered two judgments concerning the Qualification Directive: the *Elgafaji* (C-465/07) judgment of 17 February 2009 and the *Salahadin Abdulla and Others* judgment of 2 March 2010 (joined cases C-175, 176, 178 and 179/08).

C. Relevant texts of the European Commissioner for Human Rights

87. In addition to the reports published following his visits to Greece (see paragraph 160 below), the Commissioner issued a recommendation "concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders", dated 19 September 2001, which states, *inter alia*:

> "1. Everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud.
>
> 2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of *refoulement* "at the arrival gate" thus becomes unacceptable.
>
> 3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre.
>
> ...
>
> 9. On no account must holding centres be viewed as prisons.
>
> ...
>
> 11. It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the ECHR is alleged."

III. RELEVANT LAW AND PRACTICE IN GREECE

A. The conditions of reception of asylum seekers

1. Residence

88. The conditions of reception of asylum seekers in Greece are regulated primarily by Presidential Decree ("PD") no. 220/2007 transposing the Reception Directive. The provisions of this text applicable to the present judgment may be summarised as follows.

89. The authority responsible for receiving and examining the asylum application issues an asylum applicant's card free of charge immediately after the results of the fingerprint check become known and in any event no later than three days after the asylum application was lodged. This card, called the "pink card", permits the applicant to remain in Greece throughout the period during which his or her application is being examined. The card is valid for six months and renewable until the final decision is pronounced (Article 5 § 1).

90. Under Article 12 §§ 1 and 3 the competent authorities must take adequate steps to ensure that the material conditions of reception are made available to asylum seekers. They must be guaranteed a standard of living in keeping with their state of health and sufficient for their subsistence and to protect their fundamental rights. These measures may be subjected to the condition that the persons concerned are indigent.

91. An asylum seeker with no home and no means of paying for accommodation will be housed in a reception centre or another place upon application to the competent authorities

(Article 6 § 2). According to information provided by the Greek Ministry of Health and Social Solidarity, in 2009 there were fourteen reception centres for asylum seekers in different parts of the country, with a total capacity of 935 places. Six of them were reserved for unaccompanied minors.

92. Asylum seekers who wish to work are issued with temporary work permits, in conformity with the conditions laid down in PD no. 189/1998 (Article 10 § 1 of PD no. 220/2007). Article 4 c) of PD 189/1998 requires the competent authority to issue the permit after making sure the job concerned does not interest "a Greek national, a citizen of the European Union, a person with refugee status, a person of Greek origin, and so on".

93. Asylum seekers have access to vocational training programmes under the same conditions as Greek nationals (Article 11).

94. If they are financially indigent and not insured in any way, asylum seekers are entitled to free medical care and hospital treatment. First aid is also free (Article 14 of PD no. 220/2007).

2. Detention

95. When the administrative expulsion of an alien is permitted under section 76(1) of Law no. 3386/2005 (see paragraph 119, below) and that alien is suspected of intending to abscond, considered to be a threat to public order or hinders the preparation of his or her departure or the expulsion procedure, provisional detention is possible until the adoption, within three days, of the expulsion decision (section 76(2)). Until Law 3772/2009 came into force, administrative detention was for three months. It is now six months and, in certain circumstances, may be extended by twelve months.

96. An appeal to the Supreme Administrative Court against an expulsion order does not suspend the detention (section 77 of Law no. 3386/2005).

97. Where section 76(1) is found to apply upon arrival at Athens international airport, the persons concerned are placed in the detention centre next to the airport. Elsewhere in the country, they are held either in detention centres for asylum seekers or in police stations.

98. Under Article 13 § 1 of PD no. 90/2008, lodging an application for asylum is not a criminal offence and cannot, therefore, justify the applicant's detention, even if he or she entered the country illegally.

B. The asylum procedure

1. Applicable provisions

99. The provisions applicable to the applicant's asylum application are found in the following Presidential Decrees: PD no. 61/1999 on the granting of refugee status and its withdrawal and the expulsion of an alien, residence permits for family members and means of cooperation with the UNHCR; and PD no. 90/2008 transposing Procedures Directive 2005/85, as amended by PD no. 81/2009.

(a) Access to the procedure

100. All nationals of third countries or stateless persons have the right to apply for asylum. The authorities responsible for receiving and examining the applications make sure that all adults are able to exercise their right to lodge an application provided that they present themselves before the authorities in person (Article 4 § 1 of PD no. 90/2008).

101. The authorities immediately inform asylum seekers of their rights and obligations by giving them a brochure, in a language they understand, describing the procedure for examining asylum applications and the asylum seeker's rights and obligations. If the asylum seeker does not understand the language used in the form, or is illiterate, he is informed orally, with the assistance of an interpreter (Article 1 § 6 of PD 61/1999 and Article 8 § 1 a) of PD no. 90/2008).

102. An information brochure has been drafted in collaboration with the UNHCR and exists in six languages (Arabic, English, French, Greek, Persian and Turkish).

103. When asylum seekers arrive at Athens international airport, the obligation to provide this information lies with the security services present in the airport. Interpretation is provided by interpreters from Attica police headquarters, non-governmental organisations or airport staff.

104. Asylum seekers must cooperate with the competent authorities (Article 9 § 1 of PD no. 90/2008). In particular, they must inform them of any change of address (Article 6 § 1 of PD no. 220/2007).

105. If they have not already done so at the airport, asylum seekers must then report, on a Saturday, to the Aliens Directorate at Attica police headquarters, to submit their applications for asylum. Since PD no. 81/2009 (Article 1) entered into force, the lodging of asylum applications has been decentralised to the fifty-two police headquarters in different parts of the country.

106. Asylum seekers who have applied for asylum at the airport must report within three days to Attica police headquarters to register their place of residence.

107. They are then invited to the police headquarters for an individual interview, during which they may be represented. The interview is held with the assistance of an interpreter and the person concerned is asked to confirm all the information contained in the application and to give details of their identity, by what route they arrived in Greece and the reasons why they fled their country of origin (Article 10 § 1 of PD no. 90/2008).

(b) Examination of the application for asylum at first instance

108. Until 2009, after the interview the police officer in charge of the interview transmitted the asylum application to one of the three refugee advisory committees within the Ministry of Public Order (now the Ministry of Civil Protection) for an opinion. These committees were made up of police officers and municipal representatives and in some cases the UNHCR was an observer. The committee to which the application was referred transmitted an opinion, in the form of an internal report, to the Attica police headquarters, which gave its decision.

109. PD no. 81/2009 provides for the decentralisation of the examination of asylum applications at first instance and the setting up of refugee advisory committees in all fifty-two police headquarters round the country (Article 3). The examination procedure itself has not changed, but it now takes place in all fifty-two police headquarters in the different regions.

110. The decisions are taken on an individual basis, after careful, objective and impartial examination. The authorities gather and assess precise, detailed information from reliable sources, such as that supplied by the UNHCR on the general situation in the country of origin (Article 6 § 2 of PD no. 90/2008). As at every stage of the procedure, applicants are provided with an interpreter at the State's expense (Article 8 § 1 b) of PD 90/2008).

111. They have the right to consult a legal or other counsel at their own expense (Article 11 § 1 of PD no. 90/2008).

112. The decision is served on the applicant or his or her lawyer or legal representative (Article 8 § 1 d) of PD no. 90/2008). On this subject, point 10 in the brochure reads as follows:

> "...The [pink] card must mention the place of residence you have declared or the reception centre assigned to you for your stay. When the decision is given, it will be sent to the address you declared; that is why it is important to inform the police of any change of address without delay."

113. If the address is unknown, the decision is sent to the municipality where the head office of the service where the asylum application was lodged is located, where it will be displayed on a municipal notice board and communicated to the UNHCR (Article 7 § 2 of PD no. 90/2008).

114. The information is communicated in a language which the asylum seeker may reasonably be supposed to understand if he or she is not represented and has no legal assistance (Article 8 § 1 e) of PD 90/2008).

(c) Appeals against negative decisions

115. Until 2009, the refugee advisory committees examined asylum applications at second instance when these had been rejected (Article 25 of PD no. 90/2008). The UNHCR sat on these committees (Article 26 of PD no. 90/2008). Thereafter it was possible to apply to the Supreme Administrative Court to quash the decision. Article 5 of PD no. 81/2009 did away with the second-instance role of the refugee advisory committees. Since 2009 appeals against the first-instance decision have lain directly to the Supreme Administrative Court. In July 2009 the UNHCR decided that it would no longer take part in the procedure.

116. Unless the applicant has already been given the relevant information in writing, a decision to reject an application must mention the possibility of lodging an appeal, the time-limit for doing so and the consequences of letting the deadline pass (Articles 7 § 3 and 8 § 1 e) of PD 90/2008).

117. Appeals to the Supreme Administrative Court do not suspend the execution of an expulsion order issued following a decision to reject an application for asylum. However, aliens have the right to appeal against a deportation order within five days of receiving notification thereof. The decision is then given within three working days from the day on which the appeal was lodged. This type of appeal does suspend the enforcement of the expulsion decision. Where detention is ordered at the same time as expulsion, the appeal suspends the expulsion but not the detention (section 77 of Law no. 3386/2005).

118. Asylum seekers are entitled to legal aid for appeals to the Supreme Administrative Court provided that the appeals are not manifestly inadmissible or ill-founded (Article 11 § 2 of PD no. 90/2008).

(d) Protection against *refoulement*

119. Law no. 3386/2005, as amended by Law no. 3772/2009 (section 76(1) c), authorises the administrative expulsion of an alien in particular when his or her presence in Greece is a threat to public order or national security. Aliens are considered to represent such a threat if there are criminal proceedings pending against them for an offence punishable by more than three months' imprisonment. Illegally leaving the country using a false passport or other travel document is a criminal offence under sections 83(1) and 87(7) of Law no. 3386/2005.

120. However, asylum applicants and refugees are excluded from the scope of this Law (sections 1 c) and 79 d)). Asylum seekers may remain in the country until the administrative procedure for examining their application has been completed, and cannot be removed by any means (Article 1 § 1 of PD no. 61/1999 and Article 5 § 1 of PD no. 90/2008).

(e) Authorisation to stay for humanitarian reasons and subsidiary protection

121. In exceptional cases, particularly for humanitarian reasons, the Minister of Public Order (now the Minister of Civil Protection) may authorise the temporary residence of an alien whose application for refugee status has been rejected, until it becomes possible for him or her to leave the country (section 25(6) of Law no. 1975/1991). Where such authorisation is given for humanitarian reasons the criteria taken into account are the objective impossibility of removal or return to the country of origin for reasons of *force majeure*, such as serious health reasons, an international boycott of the country of origin, civil conflicts with mass human rights violations, or the risk of treatment contrary to Article 3 of the Convention being inflicted in the country of origin (Article 8 § 2 of PD no. 61/1999). In this last case the Supreme Administrative Court considers that taking into consideration the risks in respect of Article 3 of the Convention is not an option but an obligation for the administrative authorities (see, for example, judgments nos. 4055/2008 and 434/2009).

122. Subsidiary protection may also be granted in conformity with PD no. 96/2008, which transposes Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(f) Ongoing reforms in the asylum procedure

123. Following the parliamentary elections held in Greece in October 2009, the new Government set up an expert committee to give an opinion on the reform of the asylum system in Greece. Composed of experts from the Ministries of Civil Protection, the Interior and Health, and from the UNHCR, the Greek Council for refugees and the Ombudsman's office, as well as academics, the committee was asked to propose amendments to the current law and practice and make suggestions concerning the composition and modus operandi of a new civil authority to deal with applications for asylum, composed not of police officers, like today, but of public servants. It is also envisaged to restore the appellate role of the refugee advisory committees.

124. The proposals of the expert committee were submitted to the Greek Government on 22 December 2009 and a draft bill is being prepared. According to Greek Prime Minister George Papandreou, speaking at a press conference on 20 January 2010 with the participation of the United Nations High Commissioner for Refugees, Antonio Guterres, the aim pursued is to reform the legislative framework "to bring it into line with the 1951 Convention on refugees and with European law".

2. Statistical data on asylum in Greece

125. According to statistics published by the UNHCR, in 2008 Greece was in seventh place on the list of European Union Member States in terms of the number of asylum applicants received, with a total of 19,880 applications lodged that year (compared with 15,930 in 2009) (*Asylum Levels and Trends in Industrialized Countries*, 2009). 88% of the foreign nationals who entered the European Union in 2009 entered through Greece.

126. For 2008, the UNHCR reports a success rate at first instance (proportion of positive decisions in relation to all the decisions taken) of 0.04% for refugee status under the Geneva Convention (eleven people), and 0.06% for humanitarian or subsidiary protection (eighteen people) (UNHCR, *Observation on Greece as a country of asylum*, 2009). 12,095 appeals were lodged against unfavourable decisions. They led to 25 people being granted refugee status by virtue of the Geneva Convention and 11 for humanitarian reasons or subsidiary protection. Where appeals were concerned, the respective success rates were 2.87% and 1.26%. By comparison, in 2008 the average success rate at first instance was 36.2% in five of the six countries which, along with Greece, receive the largest number of applications (France, the United Kingdom, Italy, Sweden and Germany) (UNHCR, *Global Trends 2008, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*).

127. Until 2009, 95% of asylum applications went through Attica police headquarters. Since the processing of asylum applications was decentralised out to police headquarters all over the country, about 79% of the applications have been handled by Attica police headquarters.

IV. RELEVANT LAW AND PRACTICE IN BELGIUM

128. The Aliens Act organises the different stages of the asylum procedure. Where "Dublin" asylum seekers are concerned, the relevant provisions may be summarised as follows.

A. The Aliens Office

129. The Aliens Office is the administrative body responsible for registering asylum applications after consulting the Eurodac database. It is also responsible for interviewing asylum seekers about their background in order to determine whether Belgium is the country responsible under the Dublin Regulation for examining the asylum application. These aspects of the procedure are regulated by section 51/5 of the Aliens Act.

130. After the interview, the Aliens Office completes the "Dublin" request form. The form contains sections for general information about the asylum seekers and for more specific details of how they got to Belgium, their state of health and their reasons for coming to Belgium. There is no provision for asylum seekers to be assisted by a lawyer during the interview.

131. Where the Aliens Office considers that Belgium is responsible (positive decision) under the Dublin criteria or by application of the special clauses, or because the deadline for transfer has passed, it transmits the application to the Office of the Commissioner General for Refugees and Stateless Persons ("the CGRSP"), the Belgian body responsible for examining asylum applications.

132. Where the Aliens Office considers that Belgium is not responsible for examining the application (negative decision), it submits a request to the State responsible to take charge of the application. If that State agrees, explicitly or tacitly, the Aliens Office rejects the asylum application and issues a decision refusing a residence permit, together with an order to leave the country.

133. Reasons must be given for negative decisions ordering the transfer of asylum seekers. When the transfer is to Greece, the reasoning for the order to leave the country refers to the presumption that Greece honours its Community and international obligations in asylum matters and to the fact that recourse to the sovereignty clause is not obligatory in the Dublin Regulation. In some cases mention is made of the fact that the applicant has adduced no evidence demonstrating the concrete consequences of the general situation for his or her individual situation.

134. There are no accurate statistics for determining in what proportion the Aliens Office applies the sovereignty clause. The positive decisions taken do not specify. At most it appears, from the data given in the Aliens Office's 2009 annual report, that in 2009 Belgium issued 1,116 requests to other Member States to take charge of asylum applications, 420 of which were to Greece, and that a total of 166 applications were referred to the CGRSP.

135. While efforts are being made to determine which State is responsible, the alien may be held or detained in a given place for as long as is strictly necessary, but no longer than one month.

B. The Aliens Appeals Board

136. Decisions taken by the Aliens Office concerning residence may be challenged by appealing to the Aliens Appeals Board. The Aliens Appeals Board is an administrative court established by the Law of 15 September 2006 reforming the *Conseil d'Etat* and setting up an Aliens Appeals Board. It took over the powers of the *Conseil d'Etat* in disputes concerning aliens, as well as those of the Permanent Refugee Appeals Board.

137. Appeals against orders to leave the country do not have suspensive effect. The law accordingly provides for the possibility of lodging an application for a stay of execution of such an order. Such an application for a stay of execution must be lodged prior to or, at the latest, at the same time as the appeal against the order.

1. Stay of execution under the extremely urgent procedure

138. By virtue of section 39/82 of the Aliens Act, where imminent danger is alleged, an application for a stay of execution of an order to leave the country may be lodged under the extremely urgent procedure. The Aliens Appeals Board will grant the application if it considers that the grounds relied on are sufficiently serious to justify setting aside the impugned decision, and if immediate execution of the decision is likely to cause serious, virtually irreparable damage to the person concerned. The application for a stay of execution must be lodged no later than five days, but no earlier than three working days, following notification of the order to leave the country. Prior to the entry into force on 25 May 2009 of the Law of 6 May 2009, the deadline was twenty-four hours. An application for a stay of execution under the extremely urgent procedure suspends the enforcement of the expulsion order.

139. Section 39/82(4) provides for an application for a stay of execution under the extremely

urgent procedure to be examined within forty-eight hours of its receipt by the Aliens Appeals Board. If the President of the division or the judge concerned does not give a decision within that time, the First President or the President must be informed and must make sure that a decision is taken within seventy-two hours of the application being received. They may even examine the case and take the decision themselves.

140. Under the case-law established by the *Conseil d'Etat* and taken over by the Aliens Appeals Board, deprivation of liberty is enough to establish the imminent nature of the risk, without a departure having actually been scheduled.

2. Examination of the merits

141. The Aliens Appeals Board then proceeds to review the lawfulness of the impugned decision under section 39/2(2) of the Aliens Act, verifying that the administrative authority's decision relies on facts contained in the administrative file, that in the substantive and formal reasons given for its decision it did not, in its interpretation of the facts, make a manifest error of appreciation, and that it did not fail to comply with essential procedural requirements or with statutory formalities required on pain of nullity, or exceed or abuse its powers (see, for example, Aliens Appeals Board, judgment no. 14.175 of 31 July 2008).

142. Where the application for a stay of execution is rejected and the applicant deported, the proceedings on the merits continue. The Aliens Appeals Board may dismiss appeals against the order to leave the country, however, on the grounds that as the applicants are no longer in the country they no longer have any interest in challenging that order (judgment no. 28.233 of 29 May 2009; see also judgment no. 34.177 of 16 November 2009).

3. Case-law of the Aliens Appeals Board in "Dublin" cases

143. The first cases in which asylum seekers reported difficulties in accessing the asylum procedure in Greece date back to April 2008. In its judgment no. 9.796 of 10 April 2008, the Aliens Appeals Board stayed the execution of a "Dublin" transfer to Greece under the extremely urgent procedure because the Greek authorities had not responded to the request for them to take charge of the asylum application concerned and the Aliens Office had not sought individual guarantees. The Aliens Appeals Board found that a tacit agreement failed to provide sufficient guarantees of effective processing of the asylum application by the Greek authorities. Since March 2009, however, the Aliens Office no longer seeks such guarantees and takes its decisions based on tacit agreements. The Aliens Appeals Board no longer questions this approach, considering that Greece has transposed the Qualification and Procedures directives.

144. In assessing the reasoning for the order to leave the country the Aliens Appeals Board takes into consideration first and foremost the facts revealed to the Aliens Office during the Dublin interview and recorded in the administrative file. Should evidence be adduced subsequently, including documents of a general nature, in a letter to the Aliens Office during the Dublin examination process or in an appeal against the order to leave the country, it is not systematically taken into account by the Aliens Appeals Board, on the grounds that it was not adduced in good time or that, because it was not mentioned in the asylum applicant's statements to the Aliens Office, it is not credible (see, for example, judgments no. 41.482 of 9 April 2010 and no. 41.351 of 1 April 2010).

145. In cases where the Aliens Appeals Board has taken into account international reports submitted by Dublin asylum applicants confirming the risk of violation of Article 3 of the Convention because of the deficiencies in the asylum procedure and the conditions of detention and reception in Greece, its case-law is divided as to the conclusions to be drawn.

146. Certain divisions have generally been inclined to take the general situation in Greece into account. For example, in judgments nos. 12.004 and 12.005 of 29 May 2008, the Board considered that the Aliens Office should have considered the allegations of ill-treatment in Greece:

> "The applicant party informed the other party in good time that his removal to Greece would, in his opinion, amount to a violation of Article 3 of the Convention, in particular because of the inhuman and degrading treatment he alleged that he had suffered and would no doubt suffer again there. ... The Board notes that in arguing that he faced the risk, in the event that he was sent back to Greece, of being exposed to inhuman and degrading treatment contrary to Article 3 of the Convention, and in basing his arguments on reliable documentary sources which he communicated to the other party, the applicant formulated an explicit and detailed objection concerning an important dimension of his removal to Greece. The other party should therefore have replied to that objection in its decision in order to fulfil its obligations with regard to reasoning."

147. In the same vein, in judgment no. 25.962 of 10 April 2009, the Aliens Appeals Board stayed execution of a transfer to Greece in the following terms:

> "The Board considers that the terms of the report of 4 February 2009 of the Commissioner for Human Rights of the Council of Europe, (...), and the photos illustrating the information

contained in it concerning the conditions of detention of asylum seekers are particularly significant. ... While it postdates the judgments of the Board and of the European Court of Human Rights cited in the decision taken, the content of this report is clear enough to establish that despite its recent efforts to comply with proper European standards in matters of asylum and the fundamental rights of asylum seekers, the Greek authorities are not yet able to offer asylum applicants the minimum reception or procedural guarantees."

148. Other divisions have opted for another approach, which consists in taking into account the failure to demonstrate a link between the general situation in Greece and the applicant's individual situation. For example, in judgment no. 37.916 of 27 February 2009, rejecting a request for a stay of execution of a transfer to Greece, the Aliens Appeals Board reasoned as follows:

[Translation by the Registry]

"The general information provided by the applicant in his file mainly concerns the situation of aliens seeking international protection in Greece, the circumstances in which they are transferred to and received in Greece, the way they are treated and the way in which the asylum procedure in Greece functions and is applied. The materials establish no concrete link showing that the deficiencies reported would result in Greece violating its *non-refoulement* obligation vis-à-vis aliens who, like the applicant, were transferred to Greece ... Having regard to the above, the applicant has not demonstrated that the enforcement of the impugned decision would expose him to a risk of virtually irreparable harm".

149. In three cases in 2009 the same divisions took the opposite approach and decided to suspend transfers to Athens, considering that the Aliens Office, in its reasoning, should have taken into account the information on the general situation in Greece. These are judgments nos. 25.959 and 25.960 of 10 April 2009 and no. 28.804 of 17 June 2009).

150. In order to harmonise the case-law, the President of the Aliens Appeals Board convened a plenary session on 26 March 2010 which delivered three judgments (judgments nos. 40.963, 40.964 and 10.965) in which the reasoning may be summarised as follows:

- Greece is a member of the European Union, governed by the rule of law, a Party to the Convention and the Geneva Convention and bound by Community legislation in asylum matters;

- based on the principle of intra-community trust, it must be presumed that the State concerned will comply with its obligations (reference to the Court's case-law in *K.R.S. v. the United Kingdom* (dec.), no. 32733/08, ECHR 2008-...);

- in order to reverse that presumption the applicant must demonstrate *in concreto* that there is a real risk of his being subjected to treatment contrary to Article 3 of the Convention in the country to which he is being removed;

- simple reference to general reports from reliable sources showing that there are reception problems or that *refoulement* is practised or the mere fact that the asylum procedure in place in a European Union Member State is defective does not suffice to demonstrate the existence of such a risk.

151. In substance, the same reasoning is behind the judgments of the Aliens Appeals Board when it examines appeals to set aside a decision. Thus, after having declared the appeal inadmissible as far as the order to leave the country was concerned, because the applicant had already been removed, the aforementioned judgment no. 28.233 of 29 May 2009 went on to analyse the applicant's complaints under the Convention – particularly Article 3 – and rejected the appeal because the applicant had failed to demonstrate any concrete link between the general situation in Greece and his individual situation.

C. *The Conseil d'Etat*

152. The provisions concerning referrals to the *Conseil d'Etat* and the latter's powers are found in the laws on the *Conseil d'Etat* coordinated on 12 January 1973.

153. A lawyer may lodge an administrative appeal with the *Conseil d'Etat* within thirty days of notification of the judgment of the Aliens Appeals Board.

154. If the appeal is to be examined by the *Conseil d'Etat*, it must be declared admissible. It will be declared admissible if it is not manifestly inadmissible or devoid of purpose; if it is claimed that there has been a breach of the law or a failure to comply with essential procedural requirements or with statutory formalities required on pain of nullity, as long as that claim is not manifestly ill-founded and the alleged error may have influenced the decision and is sufficient to justify setting it aside; or if its examination is necessary to guarantee the consistency of the case-law.

155. This procedure is not of suspensive effect. The *Conseil d'Etat* gives judgment on the admissibility of the application in principle within eight days.

156. Where the application is declared admissible, the *Conseil d'Etat* gives a ruling within six months and may overturn decisions of the Aliens Appeals Board for breach of the law or for failure to comply with essential procedural requirements or with statutory formalities required on pain of nullity.

157. The judgments referred to in the case file show that the *Conseil d'Etat* does not question the approach of the Aliens Appeals Board explained above and considers that no problem is raised under Article 13 of the Convention (see, for example, judgment no. 5115 of 15 December 2009).

D. The courts and tribunals

158. Decisions taken by the Aliens Office concerning detention (orders to detain applicants in a given place and orders to redetain them) may be challenged in the courts. In its examination of applications for release, the Brussels Court of Appeal (Indictments Division) has developed case-law that takes into account the risks faced by the persons concerned were they to be sent back to Greece, as well as the Court's finding that Greece was violating its obligations under Article 3 (*S.D. v. Greece*, no. 53541/07, 11 June 2009, and *Tabesh v. Greece*, no. 8256/07, 26 November 2009).

V. INTERNATIONAL DOCUMENTS DESCRIBING THE CONDITIONS OF DETENTION AND RECEPTION OF ASYLUM SEEKERS AND ALSO THE ASYLUM PROCEDURE IN GREECE

A. Reports published since 2006

159. Since 2006 reports have regularly been published by national, international and non-governmental organisations deploring the conditions of reception of asylum seekers in Greece.

160. The following is a list of the main reports:

- European Committee for the Prevention of Torture, following its visit to Greece from 27 August to 9 September 2005, published on 20 December 2006;
- Report of the LIBE Committee delegation on its visit to Greece (Samos and Athens), European Parliament, 17 July 2007;
- Pro Asyl, "*The truth may be bitter but must be told - The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*", October 2007;
- UNHCR, "*Asylum in the European Union. A Study of the implementation of the Qualification Directive*", November 2007;
- European Committee for the Prevention of Torture, following its visit to Greece from 20 to 27 February 2007, 8 February 2008;
- Amnesty International, "*Greece: No place for an asylum-seeker*", 27 February 2008;
- European Council on Refugees and Exiles ("ECRE"), "*Spotlight on Greece – EU asylum lottery under fire*", 3 April 2008;
- Norwegian Organisation for Asylum Seekers ("NOAS"), "*A gamble with the right to asylum in Europe – Greek asylum policy and the Dublin II regulation*", 9 April 2008;
- UNHCR, "*Position on the return of asylum seekers to Greece under the Dublin Regulation*", 15 April 2008;
- Human Rights Watch, "*Stuck in a revolving door – Iraqis and other asylum seekers and migrants at Greece/Turkey entrance to the European Union*", November 2008;
- Clandestino, "*Undocumented migration: counting the uncountable: data and trends across Europe*", December 2008;
- Human Rights Watch, "*Left to survive*", December 2008;
- Cimade, "*Droit d'asile: les gens de Dublin II, parcours juridique de demandeurs d'asile soumis à une réadmission selon le règlement Dublin II*", December 2008;
- European Commissioner for Human Rights, Mr T. Hammarberg, report prepared following his visit to Greece from 8 to10 December 2008, 4 February 2009;
- Greek Council of Refugees, "The Dublin Dilemma – "*Burden shifting and putting asylum seekers at risk*", 23 February 2009;
- European Committee for the Prevention of Torture, report prepared following its visit to Greece from 23 to 28 September 2008, 30 June 2009;

- Austrian Red Cross and Caritas, "*The Situation of Persons Returned by Austria to Greece under the Dublin Regulation. Report on a Joint Fact-Finding Mission to Greece (May 23rd 28th 2009)*", August 2009;

- Norwegian Helsinki Committee ("NHC"), NOAS and Aitima, "*Out the back door: the Dublin II Regulation and illegal deportations from Greece*", October 2009;

- Human Rights Watch, "*Greece: Unsafe and Unwelcoming Shores*", October 2009;

- UNHCR, Observations on Greece as a country of asylum, December 2009;

- Amnesty International, "*The Dublin II Trap: transfers of Dublin Asylum Seekers to Greece*", March 2010;

- National Commission for Human Rights (Greece), "*Detention conditions in police stations and detention areas of aliens*", April 2010;

- Amnesty International, "*Irregular migrants and asylum-seekers routinely detained in substandard conditions*", July 2010

B. Conditions of detention

161. The above-mentioned reports attest to a systematic practice of detaining asylum seekers in Greece from a few days up to a few months following their arrival. The practice affects both asylum seekers arriving in Greece for the first time and those transferred by a Member State of the European Union under the Dublin Regulation. Witnesses report that no information is given concerning the reasons for the detention.

162. All the centres visited by the bodies and organisations that produced the reports listed above describe a similar situation to varying degrees of gravity: overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care. Many of the people interviewed also complained of insults, particularly racist insults, proffered by staff and the use of physical violence by guards.

163. For example, following its visit to Greece from 27 August to 9 September 2005 the CPT reported:

> "The building of the new special holding facilities for foreigners (...) represented an opportunity for Greece to adopt an approach more in line with the norms and standards developed within Europe. Regrettably, the authorities have maintained a carceral approach, often in threadbare conditions and with no purposeful activities and minimal health provision, for persons who are neither convicted nor suspected of a criminal offence and who have, as described by many Greek interlocutors, often experienced harrowing journeys to arrive in Greece."

In February 2007 the CPT inspected 24 police stations and holding centres for migrants run by the Ministry for Public Order and concluded that "persons deprived of their liberty by law enforcement officials in Greece run a real risk of being ill-treated". It added:

> "[Since the CPT's last visit to Greece, in 2005] there has been no improvement as regards the manner in which persons detained by law enforcement agencies are treated. The CPT's delegation heard, once again, a considerable number of allegations of ill- treatment of detained persons by law enforcement officials. Most of the allegations consisted of slaps, punches, kicks and blows with batons, inflicted upon arrest or during questioning by police officers. (...) In several cases, the delegation's doctors found that the allegations of ill-treatment by law enforcement officials were consistent with injuries displayed by the detained persons concerned."

In November 2008 Human Rights Watch expressed its concern in these terms:

> "Although Greek police authorities did not give Human Rights Watch unimpeded access to assess conditions of detention in the locations we asked to visit, we were able to gather testimonies from detainees that paint an alarming picture of police mistreatment, overcrowding, and unsanitary conditions, particularly in places where we were not allowed to visit, such as border police stations, the airport, Venna, and Mitilini. The detention conditions and police abuses described in the three preceding sections of this report certainly constitute inhuman and degrading treatment."

In its December 2008 report Cimade observed:

> ""In 2003 1,000 people arrived in Lesbos; in 2007 they numbered 6,000 and in the first eight months of 2008 there were 10,000 arrivals. (...) A group of demonstrators are waiting for us: chanting "no border, no nation, no deportation", about ten of them demanding that the place be closed down. Arms reach out through the fencing, calling for help. Three large caged-in rooms each holding 85 men: Afghans, Palestinians, Somalians, locked up all day

long in appalling squalor. It is chilly in the late Greek summer and people are sleeping on the bare concrete floor. There is a strong smell that reminds me of the makeshift holding areas in the waiting zone at Roissy (...). Most of the men have been there several days, some for a month. They do not understand why they are there. The men have been separated from the women and children. I go up to the second level: a Sri Lankan man with an infectious disease is being held in isolation in a small bungalow. The hangar where the women and children are held is the only open one. There are beds, but not enough, so there are mattresses on the bare concrete floor. It is late summer, but everyone complains that they are cold and there are not enough blankets. The last jail, the one for minors. There are twenty-five of them. (...)"

In his report dated February 2009, the European Commissioner for Human Rights declared:

"During the meeting with the Commissioner, the authorities in Evros department informed him that as at 1 December 2008 there were 449 irregular migrants detained by the police in six different places of detention in that department. The five most common nationalities were: Iraq (215), Afghanistan (62), Georgia (49), Pakistan (37) and Palestine (27). On 9 December 2008, date of the Commissioner's visit, at the two separate warehouse-type detention rooms of the Feres border guard station, which dates from 2000, there were 45 young, male, irregular migrants in detention, most of them Iraqis. (...) They were in fact crammed in the rooms, sleeping and stepping upon mattresses that had been placed on the floor and on a cement platform, one next to the other. In the bathrooms the conditions were squalid. Some detainees had obvious skin rashes on their arms and one with bare feet complained that the authorities did not provide him with shoes and clean clothes. (...). On 9 December 2008 the police authorities informed the Commissioner that at Kyprinos (Fylakio) there were 320 inmates in seven detention rooms, the majority of them being of Iraqi and Afghan nationalities."

164. The CPT visited the detention centre next to Athens international airport in August and September 2005. It noted:

"The conditions in the separate cell-block are of concern to the CPT's delegation. Each cell (measuring 9.5m²) had an official capacity of five persons, already too high. In fact, the registers showed that on many occasions, for example in May and June 2005 the occupancy rate reached six and even as high as nine persons per cell. An examination of the cells seemed to indicate that originally they had been designed for one person as there was only a single plinth in the cells – certainly no more than three persons, preferably no more than two, should be held overnight in such cells. The sanitary facilities were outside the cells and the delegation heard many complaints that the police guards did not respond rapidly to requests to go to the toilet; further, access to the shower appeared extremely limited, and five persons, in the same cell, claimed they had not had a shower in seven days – the overbearing hot, sweaty stench lent much credence to their allegation. The delegation also met a man who had spent one and a half months in one of the cells with no change of clothes, no access to fresh air nor any exercise nor any purposeful activity."

Following its visit to Greece in 2007, the CPT noted that there had been no improvement as regards the manner in which persons detained were treated and reported cases of ill-treatment at the hands of the police officers in the deportation cell at Athens International Airport:

"At Petru Rali Alien detention facility, a Bangladeshi national alleged that he had been slapped and kicked by the escorting police officers in the deportation cell at Athens International Airport after he had refused deportation. He further alleged that they had compressed his throat, pressed their fingers into his eye sockets, twisted his hands behind his back and kicked him on the back of the legs, the buttocks and in the abdomen, after which he had fainted. On examination by one of the medical members of the delegation, the following injuries were observed: a small abrasion (approximately 0.3 cm) on the lower lip and a red linear contusion on the left cheek beneath the eye (2 cm), which had two abrasions therein; diffuse areas of purplish bruising on both sides of the forehead and a reddish bruise (2 cm) on the centre of the chest; swelling over the thyroid cartilage on the front of the neck and swelling of the outer parts of both upper arms; on the right leg, beneath and lateral to the kneecap, a diffuse area of purplish bruising with a reddish area (approximately 2 cm x 2 cm) in its proximal part.

165. At the time of its visits in October 2009 and May 2010, Amnesty International described the detention centre next to the airport as follows:

"The facility is divided into three sectors. The first consists of three cells, each approximately 7m2. There is one window in each cell, and the sector has two separate toilets and showers. The second consists of three large cells, each approximately 50m2. There are separate toilets in the corridor outside the cells. The third sector consists of nine very small cells, each approximately 10m2. The cells are arranged in a row, off a small corridor where a card phone is situated. On the opposite side of the corridor there are two toilets and two showers.

During the October 2009 visit, Amnesty International delegates were able to view the first two sectors where Dublin II returnees and other asylum-seekers were being held. The delegates observed that detainees were held in conditions of severe overcrowding and that the physical conditions were inadequate. Many asylum-seekers reported that they had been verbally abused by police officers.

During the organization's visit in May 2010, Amnesty International representatives were allowed to visit all three sectors. The police authorities told delegates that the first sector was used for the detention of Dublin II returnees and other asylum-seekers, the second for the detention of female irregular migrants convicted for attempting to leave Greece with false documents and the third for the detention of male irregular migrants convicted for attempting to leave Greece with false documents.

During the May 2010 visit, there were seven asylum-seekers held in the first sector (six male and one female) but no Dublin II returnees. In the second sector, 15 females were held in one cell, three of them pregnant. One of the pregnant women complained several times that she could not breathe, and was asking when she could go outside her cell. In another cell there was a man with an injured leg. Those held in the first and second sector told Amnesty International delegates that the police rarely unlocked the doors of their sectors. As a result, they did not have access to the water cooler situated outside, and were forced to drink water from the toilets. At the time of the visit approximately 145 detainees were held in the third sector in conditions of severe overcrowding. Among them, delegates found a Dublin II returnee. There were nine cells in total. The delegates were able to view two of the cells, each of which contained only one bed (a concrete base with a mattress on top) and held between 14 and 17 individuals. There were not enough mattresses, and detainees slept on the floor. As a result of the overcrowding and mattresses on the floor, there was no space to move around. The detainees told Amnesty International that, because of the lack of space, they could not all lie down and sleep at the same time. While the cells viewed had windows, the overcrowding meant that the ventilation was not sufficient. The heat in the cells was unbearable.

Detainees held in the third sector told Amnesty International that the police officers did not allow them to walk in the corridor outside their cells, and that there were severe difficulties in gaining access to the toilets. At the time of the organization's visit, detainees were knocking on the cell doors and desperately asking the police to let them go to the toilet. Amnesty International delegates observed that some people who were allowed to go to the toilet were holding a plastic water bottle half or almost completely full of urine. The police authorities admitted that in every cell detainees used plastic bottles for their toilet needs which they emptied when they were allowed to go to the toilet. The delegates also observed that the toilet facilities were dirty and the two showers had neither door nor curtain, and thus lacked any privacy.

The Athens airport police authorities told Amnesty International that the imposition of prison sentences on irregular migrants or asylum-seekers arrested at the airport for using false documents, who were unable to pay trial expenses, contributed to the overcrowding of the detention area.

At the time of the visit, the organization observed a complete lack of hygiene products such as soap, shampoo and toilet paper in all sectors. In addition, many of those detained told the delegates they had no access to their luggage, so they did not have their personal belongings, including changes of clothes. Some said that, as a result, they had been wearing the same clothes for weeks. Furthermore, there was no opportunity for outside exercise at all. Two individuals complained that they did not have access to their medication because it was in their luggage. Similar reports were received during the October 2009 visit. In addition, concerns regarding access to medical assistance remained unchanged since October 2009. The airport authorities told Amnesty International that there was no regular doctor in the facility and medical care was provided only when requested by a detainee by calling the airport's first aid doctors."

166. Following their visit on 30 April 2010, *Médecins sans Frontières – Greece* published a report which also described overcrowding in the detention centre (300 detainees) and appalling sanitary and hygiene conditions. In three cells for families, with a capacity of eight to twelve people, 155 people were being held without ventilation and with only three toilets and showers.

C. Living conditions

167. According to the people interviewed for the reports listed in paragraph 160 above, when asylum seekers were released the practice varied. At Athens international airport they were either given a pink card directly or they were told to report to Attica police headquarters to get one. Sometimes those in Greece for the first time were directly issued with an order to leave the country within a few days. If they arrived and were detained elsewhere in the country, the practice was more consistent and consisted of issuing them with an order to leave the country and sending them to a large city like Athens or Patras.

168. In any event it appears that they are given no information about the possibilities of accommodation. In particular, the people interviewed reported that no one told them that they should inform the authorities that they had nowhere to live, which is a prerequisite for the authorities to try to find them some form of accommodation.

169. Those persons who have no family or relations in Greece and cannot afford to pay a rent just sleep in the streets. As a result, many homeless asylum seekers, mainly single men but also families, have illegally occupied public spaces, like the makeshift camp in Patras, which was evacuated and torn down in July 2009, or the old appeal court and certain parks in Athens.

170. Many of those interviewed reported a permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.).

171. Generally, the people concerned depend for their subsistence on civil society, the Red Cross and some religious institutions.

172. Having a pink card does not seem to be of any benefit in obtaining assistance from the State and there are major bureaucratic obstacles to obtaining a temporary work permit. For example, to obtain a tax number the applicant has to prove that he has a permanent place of residence, which effectively excludes the homeless from the employment market. In addition, the health authorities do not appear to be aware of their obligations to provide asylum seekers with free medical treatment or of the additional health risks faced by these people.

In November 2008, Human Right Watch reported:

> "Asylum seekers of all nationalities who manage to obtain and maintain their red cards have little hope of receiving support from the government during the often protracted time their claims are pending. The homeless and destitute among them often lack housing accommodation and other basic forms of social assistance, in part, because Greece only has reception centre spaces for 770 of the most needy and vulnerable asylum seekers. Although three of the 10 reception centres are reserved for unaccompanied children, Human Rights Watch met unaccompanied children, among others, who were living in the streets, parks, and in abandoned buildings because of a lack of accommodations and other social services. A 15-year-old Nigerian boy registered with the police, but at the time Human Rights Watch interviewed him was living on the street with no assistance whatsoever: "I still don't have a place for me to live. The lawyers gave me an appointment to have a place to live. Now I sleep out on the streets. I don't live anywhere. I have cold in my body. I don't feel safe. I walk around until after 1 or 2 am and then I find a park to sleep in". The Norwegian Organization for Asylum Seekers (NOAS), the Norwegian Helsinki Committee, and Greek Helsinki Monitor reported jointly in April 2008 on accommodations and social conditions awaiting Dublin II returnees to Greece, finding the number of actual places available to such destitute asylum seekers to be "negligible" and the conditions of the few accommodation centres "deplorable." They observed, "The large majority of asylum seekers remain completely without social assistance with regard to accommodation and/or other forms of social assistance. Greece is in practice a country where asylum seekers and refugees are almost entirely left to their own devices."

D. The asylum procedure

1. Access to the asylum procedure

173. The reports mentioned in paragraph 160 above describe the numerous obstacles that bar access to the asylum procedure or make it very difficult in practice for both first-time arrivals and persons transferred under the Dublin Regulation who pass through Athens international airport.

174. The first-hand accounts collected by international organisations and non-governmental organisations and the resulting conclusions may be summarised as follows.

175. Very few applications for asylum are lodged directly with the security services at the international airport because of the lack of staff but also, in certain cases, because of the lack of information that the services even exist.

176. When they arrive at the airport asylum seekers are systematically placed directly in detention before their situation has been clarified.

177. When they are released, those who have come to Greece for the first time are sometimes issued with an order to leave the country, printed in Greek, without having first been informed of the possibility of applying for asylum or contacting a lawyer for that purpose. It has even been known to happen that persons returned under the Dublin Regulation who had applied for asylum when they first arrived in Greece were issued with an order to leave the country on the grounds that, in their absence, all the time-limits for lodging an appeal had expired.

178. At Athens airport several organisations have reported that the information brochure on the asylum procedure is not always given to persons returned under the Dublin Regulation. Nor

are they given any other information about the procedures and deadlines or the possibility of contacting a lawyer or a non-governmental organisation to seek legal advice.

179. On the contrary, the police use "tricks" to discourage them from following the procedure. For example, according to several witnesses the police led them to believe that declaring an address was an absolute condition for the procedure to go ahead.

180. The three-day time-limit asylum seekers are given to report to police headquarters is in fact far too short in practice. The offices concerned are practically inaccessible because of the number of people waiting and because asylum applications can be lodged only on one day in the week. In addition, the selection criteria at the entrance to the offices are arbitrary and there is no standard arrangement for giving priority to those wishing to enter the building to apply for asylum. There are occasions when thousands of people turn up on the appointed day and only 300 to 350 applications are registered for that week. At the present time about twenty applications are being registered per day, while up to 2,000 people are waiting outside to complete various formalities. This results in a very long wait before obtaining an appointment for a first interview.

181. Because of the clearly insufficient provision for interpretation, the first interview is often held in a language the asylum seeker does not understand. The interviews are superficial and limited in substance to asking the asylum seeker why he came to Greece, with no questions at all about the situation in the country of origin. Further, in the absence of any legal aid the applicants cannot afford a legal adviser and are very seldom accompanied by a lawyer.

182. As to access to the Court, although any asylum seeker can, in theory, lodge an application with the Court and request the application of Rule 39 of the Rules of Court, it appears that the shortcomings mentioned above are so considerable that access to the Court for asylum seekers is almost impossible. This would explain the small number of applications the Court receives from asylum seekers and the small number of requests it receives for interim measures against Greece.

2. Procedure for examining applications for asylum

183. The above-listed reports also denounce the deficiencies in the procedure for examining asylum applications.

184. In the vast majority of cases the applications are rejected at first instance because they are considered to have been lodged for economic reasons. Research carried out by the UNHCR in 2010 reveals that out of 202 decisions taken at first instance, 201 were negative and worded in a stereotyped manner with no reference whatsoever to information about the countries of origin, no explanation of the facts on which the decision was based and no legal reasoning.

185. The reports denounce the lack of training, qualifications and/or competence of the police officers responsible for examining the asylum applications. In 2008, according to the UNHCR, only eleven of the sixty-five officers at Attica police headquarters responsible for examining asylum applications were specialists in asylum matters.

186. According to several accounts, it was not unusual for the decision rejecting the application and indicating the time-limit for appeal to be notified in a document written in Greek at the time of issue or renewal of the pink card. As the cards were renewed every six months, the asylum seekers did not understand that their applications had in fact been rejected and that they had the right to appeal. If they failed to do so within the prescribed deadline, however, they were excluded from the procedure, found themselves in an illegal situation and faced the risk of being arrested and placed in detention pending their expulsion.

187. The European Commissioner for Human Rights and the UNHCR also emphasised that the notification procedure for "persons with no known address" did not work in practice. Thus, many asylum seekers were unable to follow the progress of their applications and missed the deadlines.

188. The time taken for asylum applications to be examined at first instance and on appeal is very long. According to the UNHCR, in July 2009, 6,145 cases at first instance and 42,700 cases on appeal were affected by delays. According to information sent to the Commissioner by the Greek Ministry of Civil Protection, the total number of asylum applications pending had reached 44,650 in February 2010.

3. Remedies

189. Being opposed, *inter alia*, to the abolition in 2009 of thesecond-instance role played by the refugee advisory committees (see paragraph 122 above), the UNHCR announced in a press release on 17 July 2009 that it would no longer be taking part in the asylum procedure in Greece.

190. Concerning appeals to the *Conseil d'Etat*, the reports mentioned in paragraph 160 above denounce the excessive length of the proceedings. According to the European Commissioner for Human Rights, the average duration at the present time was five and a half years. They also emphasise that an appeal against a negative decision does not automatically suspend the

expulsion order and that separate proceedings have to be initiated in order to seek a stay of execution. These can last between ten days and four years. Furthermore, they consider that the review exercised by the *Conseil d'Etat* is not extensive enough to cover the essential details of complaints alleging Convention violations.

191. Lastly, they remark that in practice the legal aid system for lodging an appeal with the *Conseil d'Etat* does not work. It is hindered by the reluctance and the resulting lack of lawyers on the legal aid list because of the length of the proceedings and the delays in their remuneration.

4. Risk of refoulement

192. The risk of *refoulement* of asylum seekers by the Greek authorities, be it indirectly, to Turkey, or directly to the country of origin, is a constant concern. The reports listed in paragraph 161 above, as well as the press, have regularly reported this practice, pointing out that the Greek authorities deport, sometimes collectively, both asylum seekers who have not yet applied for asylum and those whose applications have been registered and who have been issued with pink cards. Expulsions to Turkey are effected either at the unilateral initiative of the Greek authorities, at the border with Turkey, or in the framework of the readmission agreement between Greece and Turkey. It has been established that several of the people thus expelled were then sent back to Afghanistan by the Turkish authorities without their applications for asylum being considered.

193. Several reports highlight the serious risk of *refoulement* as soon as the decision is taken to reject the asylum application, because an appeal to the *Conseil d'Etat* has no automatic suspensive effect.

5. Letter of the UNHCR of 2 April 2009

194. On 2 April 2009 the UNHCR sent a letter to the Belgian Minister of Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. A copy was sent to the Aliens Office. The letter read as follows (extracts):

> "The UNHCR is aware that the Court, in its decision in *K.R.S. v. the United Kingdom* ... recently decided that the transfer of an asylum seeker to Greece did not present a risk of *refoulement* for the purposes of Article 3 of the Convention. However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum seekers were in conformity with regional and international standards of human rights protection, or whether asylum seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case."

195. It concluded:

> "For the above reasons the UNHCR maintains its assessment of the Greek asylum system and the recommendations formulated in its position of April 2008, namely that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves, in keeping with Article 3 § 2 of the Dublin Regulation."

VI. INTERNATIONAL DOCUMENTS DESCRIBING THE SITUATION IN AFGHANISTAN

196. Afghanistan has been embroiled in an armed conflict since 1979. The present situation is based on the civil war of 1994-2001, during which the *Mujahidin* (the veterans of the anti-Soviet resistance, many of whose leaders now hold public office) fought the Taliban movement, and fall-out from the attacks of 11 September 2001 in the United States.

197. According to the UNHCR ("Guidelines for assessing the international protection needs of Afghan asylum seekers", July 2009, which replaced those of December 2007), the situation in Afghanistan can be described as an intensifying armed conflict accompanied by serious and widespread targeted human rights violations. The Government and their international allies are pitted against groups of insurgents including the Taliban, the Hezb-e Eslami and Al-Qaeda. A complex array of legal and illegal armed groups and organised criminal groups also play an important role in the conflict. Despite efforts at reform, Afghanistan is still faced with widespread corruption, lack of due process and an ineffective administration of justice. Human rights violations are rarely addressed or remedied by the justice system and impunity continues to be pervasive. The progressive strengthening of religious conservatism has pressured the Government and Parliament into curtailing fundamental rights and freedoms.

198. In the above-mentioned document, the UNHCR says that most of the fighting is still in the south and south-eastern part of the country. In the south the provinces of Helmand and Kandahar, Taliban strongholds, are the scene of fierce fighting. The conflict raging in the southern, south-eastern and eastern regions has displaced the population and caused numerous civilian casualties.

199. There is more and more evidence that the people implementing or thought to be implementing government projects and the non-governmental organisations or civil firms actually working or thought to be working with the international forces in Afghanistan face a very high risk of being targeted by anti-government factions.

200. As to the possibilities of internal relocation, the UNHCR points out that no region of Afghanistan is safe and that even if one were to be found, it might not be accessible as many of the main roads in Afghanistan are dangerous.

201. In Kabul the situation has deteriorated. Rising economic emigration is putting increasing pressure on the employment market and on resources such as infrastructure, land and drinking water. The situation is exacerbated by persistent drought, with the resultant spread of water-related diseases. Endemic unemployment and under-employment limit many people's ability to cater for their basic needs.

202. The UNHCR generally considers internal relocation as a reasonable alternative solution when protection can be provided in the relocation area by the person's family in the broad sense, their community or their tribe. However, these forms of protection are limited to regions where family or tribal links exist. Even in such situations case-by-case analysis is necessary, as traditional social bonds in the country have been worn away by thirty years of war, mass displacement of refugees and the growing rural exodus.

203. Bearing in mind the recommendations contained in these directives, the Belgian body responsible for examining asylum applications (the CGRSP, see paragraph 131 above) stated in a February 2010 document entitled "the Office of the Cimmissioner General for Refugees and Stateless Persons Policy on Afghan Asylum Seekers" that they granted protection to a large number of Afghan asylum seekers from particularly dangerous regions.

THE LAW

204. In the circumstances of the case the Court finds it appropriate to proceed by first examining the applicant's complaints against Greece and then his complaints against Belgium.

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE CONDITIONS OF THE APPLICANT'S DETENTION

205. The applicant alleged that the conditions of his detention at Athens international airport amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

206. The applicant complained about both periods of detention – the first one, from 15 to 18 June 2009, following his arrival at Athens international airport, and the second one, from 1 to 7 August 2009, following his arrest at the airport. He submitted that the conditions of detention at the centre next to Athens international airport were so appalling that they had amounted to inhuman and degrading treatment. The applicant described his conditions of detention as follows: he had been locked in a small room with twenty other people, had had access to the toilets only at the discretion of the guards, had not been allowed out into the open air, had been given very little to eat and had had to sleep on a dirty mattress or on the bare floor. He further complained that during his second period of detention he had been beaten by the guards.

2. The Greek Government

207. The Government disputed that the applicant's rights under Article 3 had been violated during his detention. The applicant had adduced no evidence that he had suffered inhuman or degrading treatment.

208. In contrast with the description given by the applicant, the Government described the holding centre as a suitably equipped short-stay accommodation centre specially designed for asylum seekers, where they were adequately fed.

209. In their observations in reply to the questions posed by the Court during the hearing before the Grand Chamber, the Government gave more detailed information about the layout and facilities of the centre. It had a section reserved for asylum seekers, comprising three rooms, ten beds and two toilets. The asylum seekers shared a common room with people awaiting expulsion, where there was a public telephone and a water fountain. The applicant had been held there in June 2009 pending receipt of his pink card.

210. The Government stated that in August 2009 the applicant had been held in a section of the centre separate from that reserved for asylum seekers, designed for aliens who had

committed a criminal offence. The persons concerned had an area of 110 m2, containing nine rooms and two toilets. There was also a public telephone and a water fountain.

211. Lastly, the Government stressed the short duration of the periods of detention and the circumstances of the second period, which had resulted not from the applicant's asylum application but from the crime he had committed in attempting to leave Greece with false documents.

B. Observations of the European Commissioner for Human Rights and the Office of the United Nations High Commissioner for Refugees, intervening as third parties

212. The Commissioner stated that he had been informed by *Médecins sans Frontières – Greece* (see paragraph 166 above) of the conditions of detention in the centre next to the airport.

213. The UNHCR had visited the centre in May 2010 and found the conditions of detention there unacceptable, with no fresh air, no possibility of taking a walk in the open air and no toilets in the cells.

C. The Court's assessment

1. Admissibility

214. The Court considers that the applicant's complaints under Article 3 of the Convention concerning the conditions of his detention in Greece raise complex issues of law and fact, the determination of which requires an examination of the merits.

215. It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Recapitulation of general principles

216. The Court reiterates that the confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions (see *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III).

217. Where the Court is called upon to examine the conformity of the manner and method of the execution of the measure with the provisions of the Convention, it must look at the particular situations of the persons concerned (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 100, ECHR 2008-... (extracts)).

218. The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

219. The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).

220. The Court considers treatment to be "inhuman" when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering".

Treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance (*ibid*., § 92, and *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III). It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26). Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III).

221. Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see, for example, *Kudła*, cited above, § 94).

222. The Court has held that confining an asylum seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounted to degrading treatment within the meaning of Article 3 of the Convention (see *S.D. v. Greece*, no. 53541/07, § 49 to 54, 11 June 2009). Similarly, a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3 (*ibid*., § 51). The detention of an asylum seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals has also been considered as degrading treatment (see *Tabesh v. Greece*,no. 8256/07, §§ 38 to 44, 26 November 2009). Lastly, the Court has found that the detention of an applicant, who was also an asylum seeker, for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions amounted to degrading treatment prohibited by Article 3 (see *A.A. v. Greece*, no. 12186/08, §§ 57 to 65, 22 July 2010).

(b) Application in the present case

223. The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation (see paragraphs 65-82 above). The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision.

224. That being so, the Court does not accept the argument of the Greek Government that it should take these difficult circumstances into account when examining the applicant's complaints under Article 3.

225. The Court deems it necessary to take into account the circumstances of the applicant's placement in detention and the fact that in spite of what the Greek Government suggest, the applicant did not, on the face of it, have the profile of an "illegal immigrant". On the contrary, following the agreement on 4 June 2009 to take charge of the applicant, the Greek authorities were aware of the applicant's identity and of the fact that he was a potential asylum seeker. In spite of that, he was immediately placed in detention, without any explanation being given.

226. The Court notes that according to various reports by international bodies and non-governmental organisations (see paragraph 160 above), the systematic placement of asylum seekers in detention without informing them of the reasons for their detention is a widespread practice of the Greek authorities.

227. The Court also takes into consideration the applicant's allegations that he was subjected to brutality and insults by the police during his second period of detention. It observes that these allegations are not supported by any documentation such as a medical certificate and that it is not possible to establish with certainty exactly what happened to the applicant. However, the Court is once again obliged to note that the applicant's allegations are consistent with numerous accounts collected from witnesses by international organisations (see paragraph 160 above). It notes, in particular, that following its visit to the holding centre next to Athens international airport in 2007, the European Committee for the Prevention of Torture reported cases of ill-treatment at the hands of police officers (see paragraph 163 above).

228. The Court notes that the parties disagree about the sectors in which the applicant was held. The Government submit that he was held in two different sectors and that the difference between the facilities in the two sectors should be taken into account. The applicant, on the other hand, claims that he was held in exactly the same conditions during both periods of detention. The Court notes that the assignment of detainees to one sector or another does not follow any strict pattern in practice but may vary depending on the number of detainees in each sector (see paragraph 165 above). It is possible, therefore, that the applicant was detained twice in the same sector. The Court concludes that there is no need for it to take into account the distinction made by the Government on this point.

229. It is important to note that the applicant's allegations concerning living conditions in the

holding centre are supported by similar findings by the CPT (see paragraph 163 above), the UNHCR (see paragraph 213 above), Amnesty International and *Médecins sans Frontières – Greece* (paragraphs 165 and 166 above) and are not explicitly disputed by the Government.

230. The Court notes that, according to the findings made by organisations that visited the holding centre next to the airport, the sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq. m space. In a number of cells there was only one bed for fourteen to seventeen people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.

231. The Court reiterates that it has already considered that such conditions, which are found in other detention centres in Greece, amounted to degrading treatment within the meaning of Article 3 of the Convention (see paragraph 222 above). In reaching that conclusion, it took into account the fact that the applicants were asylum seekers.

232. The Court sees no reason to depart from that conclusion on the basis of the Greek Government's argument that the periods when the applicant was kept in detention were brief. It does not regard the duration of the two periods of detention imposed on the applicant – four days in June 2009 and a week in August 2009 – as being insignificant. In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.

233. On the contrary, in the light of the available information on the conditions at the holding centre near Athens airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.

234. There has therefore been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE APPLICANT'S LIVING CONDITIONS

235. The applicant alleged that the state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment within the meaning of Article 3, cited above.

A. The parties' submissions

1. The applicant

236. The applicant complained that the Greek authorities had given him no information about possible accommodation and had done nothing to provide him with any means of subsistence even though they were aware of the precarious situation of asylum seekers in general and of his case in particular. He submitted that he had been given no information brochure about the asylum procedure and that he had told the authorities several times that he was homeless. This was demonstrated, he submitted, by the words "no known place of residence" that appeared on the notification issued to him on 18 June 2009.

237. The applicant pointed out that steps had been taken to find him accommodation only after he had informed the police, on 18 December 2009, that his case was pending before the Court. He submitted that he had presented himself at the police headquarters a number of times in December and early January 2010 and waited for hours to find out whether any accommodation had been found. As no accommodation was ever offered he had, eventually, given up.

238. With no means of subsistence, he, like many other Afghan asylum seekers, had lived in a park in the middle of Athens for many months. He spent his days looking for food. Occasionally he received material aid from the local people and the church. He had no access to any sanitary facilities. At night he lived in permanent fear of being attacked and robbed. He submitted that the resulting situation of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3.

239. The applicant considered that his state of need, anxiety and uncertainty was such that he had no option but to leave Greece and seek refuge elsewhere.

2. The Greek Government

240. The Government submitted that the situation in which the applicant had found himself after he had been released was the result of his own choices and omissions. The applicant had chosen to invest his resources in fleeing the country rather than in accommodation. Furthermore, he had waited until 18 December 2009 before declaring that he was homeless. Had he followed the instructions in the notification of 18 June 2009 and gone to the Attica police headquarters earlier to let them know he had nowhere to stay, the authorities could have taken steps to find him accommodation. The Government pointed out that the words "no known place of residence" that appeared on the notification he was given simply meant that he had not informed the authorities of his address.

241. Once the authorities had been informed of the applicant's situation, the necessary steps had been taken and he had now been found a place in a hostel. The authorities had been unable to inform the applicant of this, however, as he had left no address where they could contact him. In addition, since June 2009 the applicant had had a "pink card" that entitled him to work, vocational training, accommodation and medical care, and which had been renewed twice.

242. The Government argued that in such circumstances it was up to the applicant to come forward and show an interest in improving his lot. Instead, however, everything he had done in Greece indicated that he had no wish to stay there.

243. In any event the Greek Government submitted that to find in favour of the applicant would be contrary to the provisions of the Convention, none of which guaranteed the right to accommodation or to political asylum. To rule otherwise would open the doors to countless similar applications from homeless persons and place an undue positive obligation on the States in terms of welfare policy. The Government pointed out that the Court itself had stated that "while it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision" (*Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I).

B. Observations of the European Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre and Amnesty International, intervening as third parties

244. The Commissioner pointed out that in comparison with the number of asylum applications lodged in Greece each year, the country's reception capacity – which in February 2010 he said amounted to eleven reception centres with a total of 741 places – was clearly insufficient. He said that the material situation of asylum seekers was very difficult and mentioned the makeshift camp at Patras which, until July 2009, had housed around 3,000 people, mainly Iraqis and Afghans, in unacceptable conditions from the point of view of housing and hygiene standards. During his visit in February 2010 he noted that in spite of the announcement made by the Government in 2008, construction work on a centre capable of housing 1,000 people had not yet started. The police authorities in Patras had informed him that about 70 % of the Afghans were registered asylum seekers and holders of "pink cards". He also referred to the case of three Afghans in the region of Patras who had been in Greece for two years, living in cardboard shelters with no help from the Greek State. Only the local Red Cross had offered them food and care.

245. The UNHCR shared the same concern. According to data for 2009, there were twelve reception centres in Greece with a total capacity of 865 places. An adult male asylum seeker had virtually no chance at all of being offered a place in a reception centre. Many lived in public spaces or abandoned houses or shared the exorbitant cost of a room with no support from the State. According to a survey carried out from February to April 2010, all the "Dublin" asylum seekers questioned were homeless. At the hearing the UNHCR emphasised how difficult it was to gain access to the Attica police headquarters – making it virtually impossible to comply with the deadlines set by the authorities – because of the number of people waiting and the arbitrary selection made by the security staff at the entrance to the building.

246. According to the Aire Centre and Amnesty International, the situation in Greece today is that asylum seekers are deprived not only of material support from the authorities but also of the right to provide for their own needs. The extreme poverty thus produced should be considered as treatment contrary to Article 3 of the Convention, in keeping with the Court's case-law in cases concerning situations of poverty brought about by the unlawful action of the State.

C. The Court's assessment

1. Admissibility

247. The Court considers that the applicant's complaints under Article 3 of the Convention because of his living conditions in Greece raise complex issues of law and fact, the determination of which requires an examination of the merits.

248. It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

249. The Court has already reiterated the general principles found in the case-law on Article 3 of the Convention and applicable in the instant case (see paragraphs 216-222 above). It also considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (see *Chapman*, cited above, § 99). Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *Müslim v. Turkey*, no. 53566/99, § 85, 26 April 2005).

250. The Court is of the opinion, however, that what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited Müslim case (§§ 83 and 84), the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the Member States ("the Reception Directive" – see paragraph 84 above). What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.

251. The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010-...). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.

252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.

253. The Court reiterates that it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity" (see *Budina v. Russia*, dec., no. 45603/05, ECHR 2009...).

254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.

255. The Court notes in the observations of the European Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations (see paragraph 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason the Court sees no reason to question the truth of the applicant's allegations.

256. The Greek Government argue that the applicant is responsible for his situation, that the authorities acted with all due diligence and that he should have done more to improve his situation.

257. The parties disagree as to whether the applicant was issued with the information brochure for asylum seekers. The Court fails to see the relevance of this, however, as the brochure does not state that asylum seekers can tell the police they are homeless, nor does it contain any information about accommodation. As to the notification the applicant received informing him of the obligation to go to the Attica police headquarters to register his address (see paragraph 35 above), in the Court's opinion its wording is ambiguous and cannot reasonably be considered as sufficient information. It concludes that the applicant was not duly informed at any time of the possibilities of accommodation that were available to him, assuming that there were any.

258. In any event the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. The Court also notes that, according to the UNHCR, it is a well-known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings (see paragraphs 169, 244 and 242 above).

259. Although the Court cannot verify the accuracy of the applicant's claim that he informed the Greek authorities of his homelessness several times prior to December 2009, the above data concerning the capacity of Greece's reception centres considerably reduce the weight of the Government's argument that the applicant's inaction was the cause of his situation. In any event, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.

260. The fact that a place in a reception centre has apparently been found in the meantime does not change the applicant's situation since the authorities have not found any way of informing him of this fact. The situation is all the more disturbing in that this information was already referred to in the Government's observations submitted to the Court on 1 February 2010, and the Government informed the Grand Chamber that the authorities had seen the applicant on 21 June 2010 and handed him a summons without, however, informing him that accommodation had been found.

261. The Court also fails to see how having a pink card could have been of any practical use whatsoever to the applicant. The law does provide for asylum seekers who have been issued with pink cards to have access to the job market, which would have enabled the applicant to try to solve his problems and provide for his basic needs. Here again, however, the reports consulted reveal that in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative (see paragraphs 160 and 172 above). In addition the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate.

262. Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.

263. In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see paragraph 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

264. It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision.

III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE

265. The applicant complained that he had no effective remedy in Greek law in respect of his complaints under Articles 2 and 3, in violation of Article 13 of the Convention, which reads as follows:

Article 13

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

266. He alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of *refoulement* to his country of origin without any real examination of the merits of

his asylum application, in violation of Article 3, cited above, and of Article 2 of the Convention, which reads:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

A. The parties' submissions

1. The applicant

267. The applicant submitted that he had fled Afghanistan after escaping an attempt on his life by the Taliban in reprisal for his having worked as an interpreter for the international air force troops based in Kabul. Since arriving in Europe he had had contacts with members of his family back in Afghanistan, who strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse.

268. The applicant wanted his fears to be examined and had applied for asylum in Greece for that purpose. He had no confidence in the functioning of the asylum procedure, however.

269. Firstly, he complained about the practical obstacles he had faced. For example, he alleged that he had never been given an information brochure about the asylum procedure at the airport but had merely been told that he had to go to the Attica police headquarters to register his address. He had not done so because he had had no address to register. He had been convinced that having an address was a condition for the procedure to be set in motion. He had subsequently presented himself, in vain, at the police headquarters on several occasions, where he had had to wait for hours, so far without any prospect of his situation being clarified.

270. Secondly, the applicant believed that he had escaped being sent back to his own country only because of the interim measure indicated by the Court to the Greek Government. Apart from that "protection", he had no guarantee at this stage that his asylum procedure would follow its course. Even if it did, the procedure offered no guarantee that the merits of his fears would be seriously examined by the Greek authorities. He argued that he did not have the wherewithal to pay for a lawyer's services, that there was no provision for legal aid at this stage, that first-instance interviews were known to be superficial, that he would not have the opportunity to lodge an appeal with a body competent to examine the merits of his fears, that an appeal to the Supreme Administrative Court did not automatically have suspensive effect and that the procedure was a lengthy one. According to him, the almost non-existent record of cases where the Greek authorities had granted international protection of any kind whatsoever at first instance or on appeal showed how ineffective the procedure was.

2. The Greek Government

271. The Government submitted that the applicant had not suffered the consequences of the alleged shortcomings in the asylum procedure and could therefore not be considered as a victim for the purposes of the Convention.

272. The applicant's attitude had to be taken into account: he had, in breach of the legislation, failed to cooperate with the authorities and had shown no interest in the smooth functioning of the procedure. By failing to report to the Attica police headquarters in June 2009 he had failed to comply with the formalities for initiating the procedure and had not taken the opportunity to inform the police that he had no address, so that they could notify him of any progress through another channel. Furthermore, he had assumed different identities and attempted to leave Greece while hiding from the authorities the fact that he had applied for asylum there.

273. The Government considered that the Greek authorities had followed the statutory procedure in spite of the applicant's negligence and the errors of his ways. They argued in particular that this was illustrated by the fact that the applicant was still in Greece and had not been deported in spite of the situation he had brought upon himself by trying to leave the country in August 2009.

274. In the alternative, the Government alleged that the applicant's complaints were unfounded. They maintained that Greek legislation was in conformity with Community and international law on asylum, including the *non-refoulement* principle. Greek law provided for the examination of the merits of asylum applications with regard to Articles 2 and 3 of the Convention. Asylum seekers had access to the services of an interpreter at every step of the proceedings.

275. The Government confirmed that the applicant's application for asylum had not yet been examined by the Greek authorities but assured the Court that it would be, with due regard for the standards mentioned above.

276. In conformity with Article 13 of the Convention, unsuccessful asylum seekers could apply for judicial review to the Supreme Administrative Court. According to the Government, such an appeal was an effective safety net that offered the guarantees the Court had requested in its *Bryan v. the United Kingdom* judgment (22 November 1995, § 47, Series A no. 335-A). They produced various judgments in which the Supreme Administrative Court had set aside decisions rejecting asylum applications because the authorities had failed to take into account certain documents that referred, for example, to a risk of persecution. In any event, the Government pointed out that providing asylum seekers whose applications had been rejected at first instance with an appeal on the merits was not a requirement of the Convention.

277. According to the Government, complaints concerning possible malfunctions of the legal aid system should not be taken into account because Article 6 did not apply to asylum procedures. In the same manner, any procedural delays before the Supreme Administrative Court fell within the scope of Article 6 of the Convention and could therefore not be examined by the Court in the present case.

278. Moreover, as long as the asylum procedure had not been completed, asylum seekers ran no risk of being returned to their country of origin and could, if necessary, ask the Supreme Administrative Court to stay the execution of an expulsion order issued following a decision rejecting the asylum application, which would have the effect of suspending the enforcement of the measure. The Government provided several judgments in support of that affirmation.

279. The Government averred in their oral observations before the Grand Chamber that even in the present circumstances the applicant ran no risk of expulsion to Afghanistan at any time as the policy at the moment was not to send anyone back to that country by force. The forced returns by charter flight that had taken place in 2009 concerned Pakistani nationals who had not applied for asylum in Greece. The only Afghans who had been sent back to Afghanistan – 468 in 2009 and 296 in 2010 – had been sent back on a voluntary basis as part of the programme financed by the European Return Fund. Nor was there any danger of the applicant being sent to Turkey because, as he had been transferred to Greece by another European Union Member State, he did not fall within the scope of the readmission agreement concluded between Greece and Turkey.

280. In their oral observations before the Grand Chamber, the Government further relied on the fact that the applicant had not kept the appointment of 21 June 2010 for an initial interview on 2 July 2010, when that interview would have been an opportunity for him to explain his fears to the Greek authorities in the event of his return to Afghanistan. It followed, according to the Government, that not only had the applicant shown no interest in the asylum procedure, but he had not exhausted the remedies under Greek law regarding his fears of a violation of Articles 2 and 3 of the Convention.

B. Observations of the European Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre, Amnesty International and the Greek Helsinki Monitor, intervening as third parties

281. The Commissioner, the UNHCR, the Aire Centre, Amnesty International and GHM were all of the opinion that the current legislation and practice in Greece in asylum matters were not in conformity with international and European human rights protection standards. They deplored the lack of adequate information, or indeed of any proper information at all about the asylum procedure, the lack of suitably trained staff to receive and process asylum applications, the poor quality of first-instance decisions owing to structural weaknesses and the lack of procedural guarantees, in particular access to legal aid and an interpreter and the ineffectiveness as a remedy of an appeal to the Supreme Administrative Court because of the excessively long time it took, the fact that it had no automatic suspensive effect and the difficulty in obtaining legal aid. They emphasised that "Dublin" asylum seekers were faced with the same obstacles in practice as other asylum seekers.

282. The Commissioner and the UNHCR expressed serious concern about the continuing practice by the Greek authorities of forced returns to Turkey, be they collective or individual. The cases they had identified concerned both persons arriving for the first time and those already registered as asylum seekers.

C. The Court's assessment

1. Admissibility

283. The Greek Government submitted that the applicant was not a victim within the meaning of Article 34 of the Convention because he alone was to blame for the situation, at the origin of his complaint, in which he found himself and he had not suffered the consequences of any shortcomings in the procedure. The Government further argued that the applicant had not gone

to the first interview at the Attica police headquarters on 2 July 2010 and had not given the Greek authorities a chance to examine the merits of his allegations. This meant that he had not exhausted the domestic remedies and the Government invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.

284. The Court notes that the questions raised by the Government's preliminary objections are closely bound up with those it will have to consider when examining the complaints under Article 13 of the Convention taken in conjunction with Articles 2 and 3, because of the deficiencies of the asylum procedure in Greece. They should therefore be examined together with the merits of those complaints.

285. Moreover, the Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination of the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Recapitulation of general principles

286. In cases concerning the expulsion of asylum seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see, among other authorities, *T.I. v. the United Kingdom* (dec. no. 43844/98, ECHR 2000-III), and *Müslim*, cited above, §§ 72 to 76).

287. By virtue of Article 1 (which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

288. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudla* cited above, § 157).

289. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 53, ECHR 2007-V § 53).

290. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV).

291. Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII).

292. Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X).

293. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), as well as a particularly prompt response (see *Batı and Others v. Turkey*, nos.

33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I, and *Gebremedhin [Gaberamadhien]*, cited above, § 66).

(b) Application in the present case

294. In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.

295. It notes that, when lodging his application the applicant produced, in support of his fears concerning Afghanistan, copies of certificates showing that he had worked as an interpreter (see paragraph 31 above). It also has access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan published by the UNHCR and regularly updated (see paragraphs 197-202 above).

296. For the Court, this information is *prima facie* evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces. It further notes that the gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties. On the contrary, the Greek Government have stated that their current policy is not to send asylum seekers back to that country by force precisely because of the high-risk situation there.

297. The Court concludes from this that the applicant has an arguable claim under Article 2 or Article 3 of the Convention.

298. This does not mean that in the present case the Court must rule on whether there would be a violation of those provisions if the applicant were returned. It is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.

299. The Court notes that Greek legislation, based on Community law standards in terms of asylum procedure, contains a number of guarantees designed to protect asylum seekers from removal back to the countries from which they have fled without any examination of the merits of their fears (see paragraphs 99-121 above). It notes the Government's assurances that the applicant's application for asylum will be examined in conformity with the law.

300. The Court observes, however, that for a number of years the UNHCR and the European Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin (see paragraphs 160 and 173-195 above).

301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum (see paragraphs 173-188 above): insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.

302. The Court is also concerned about the findings of the different surveys carried out by the UNHCR, which show that almost all first-instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given (see paragraph 184 above). In addition, the watchdog role played by the refugee advisory committees at second instance has been removed and the UNHCR no longer plays a part in the asylum procedure (see paragraphs 114 and 189 above).

303. The Government maintained that whatever deficiencies there might be in the asylum procedure, they had not affected the applicant's particular situation.

304. The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government's

good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the UNHCR and various non-governmental organisations. In the Court's opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.

305. The Government also criticised the applicant for not setting the procedure in motion by going to the Attica police headquarters within the time-limit prescribed in the notification.

306. On this point the Court notes firstly that the three-day time-limit the applicant was given was a very short one considering how difficult it is to gain access to the police headquarters concerned.

307. Also, it must be said that the applicant was far from the only one to have misinterpreted the notice and that many asylum seekers do not go to the police headquarters because they have no address to declare.

308. Moreover, even if the applicant did receive the information brochure, the Court shares his view that the text is very ambiguous as to the purpose of the convocation (see paragraph 112 above), and that nowhere is it stated that asylum seekers can inform the Attica police headquarters that they have no address in Greece, so that information can be sent to them through another channel.

309. In such conditions the Court considers that the Government can scarcely rely on the applicant's failure to comply with this formality and that they should have proposed a reliable means of communicating with the applicant so that he could follow the procedure effectively.

310. Next, the Court notes that the parties agree that the applicant's asylum request has not yet been examined by the Greek authorities.

311. According to the Government, this situation is due at present to the fact that the applicant did not keep the appointment on 2 July 2010 to be interviewed by the refugee advisory committee. The Government have not explained the impact of that missed appointment on the progress of the domestic proceedings. Be that as it may, the applicant informed the Court, through his counsel, that the convocation had been given to him in Greek when he renewed his pink card, and that the interpreter had made no mention of any date for an interview. Although not in a position to verify the truth of the matter, the Court again attaches more weight to the applicant's version, which reflects the serious lack of information and communication affecting asylum seekers.

312. In such conditions the Court does not share the Government's view that the applicant, by his own actions, failed to give the domestic authorities an opportunity to examine the merits of his complaints and that he has not been affected by the deficiencies in the asylum procedure.

313. The Court concludes that to date the Greek authorities have not taken any steps to communicate with the applicant or reached any decision in his case, offering him no real and adequate opportunity to defend his application for asylum. What is more, the Court takes note of the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union member States (see paragraphs 125-126 above). The importance to be attached to statistics varies, of course, according to the circumstances, but in the Court's view they tend here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure.

314. The Court is not convinced by the Greek Government's explanations concerning the policy of returns to Afghanistan organised on a voluntary basis. It cannot ignore the fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court (see paragraphs 160, 192 and 282).

315. Of at least equal concern to the Court are the risks of *refoulement* the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009, by application of PD no. 90/2008 (see paragraphs 43-48 and 120 above). However, he claimed that he had barely escaped a second attempt by the police to deport him to Turkey. The fact that in both cases the applicant had been trying to leave Greece cannot be held against him when examining the conduct of the Greek authorities with regard to the Convention and when the applicant was attempting to find a solution to a situation the Court considers contrary to Article 3 (see paragraphs 263 and 264 above).

316. The Court must next examine whether, as the Government alleged, an application to the Supreme Administrative Court for judicial review of a possible rejection of the applicant's request for asylum may be considered as a safety net protecting him against arbitrary *refoulement*.

317. The Court begins by observing that, as the Government have alleged, although such an application for judicial review of a decision rejecting an asylum application has no automatic

suspensive effect, lodging an appeal against an expulsion order issued following the rejection of an application for asylum does automatically suspend enforcement of the order.

318. However, the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address" reported by the European Commissioner for Human Rights and the UNHCR (see paragraph 187 above), makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

319. In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum seekers are concerned.

320. Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (see paragraph 293 above). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3. It accordingly considers that the information supplied by the European Commissioner for Human Rights concerning the length of proceedings (see paragraph 190 above), which the Government have not contradicted, is evidence that an appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits.

(c) Conclusion

321. In the light of the above, the preliminary objections raised by the Greek Government (see paragraph 283 above) cannot be accepted and the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

322. In view of that finding and of the circumstances of the case, the Court considers that there is no need for it to examine the applicant's complaints lodged under Article 13 taken in conjunction with Article 2.

IV. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO THE RISKS ARISING FROM THE DEFICIENCIES IN THE ASYLUM PROCEDURE IN GREECE

323. The applicant alleged that by sending him to Greece under the Dublin Regulation when they were aware of the deficiencies in the asylum procedure in Greece and had not assessed the risk he faced, the Belgian authorities had failed in their obligations under Articles 2 and 3 of the Convention, cited above.

A. The parties' submissions

1. The applicant

324. The applicant submitted that at the time of his expulsion the Belgian authorities had known that the asylum procedure in Greece was so deficient that his application for asylum had little chance of being seriously examined by the Greek authorities and that there was a risk of him being sent back to his country of origin. In addition to the numerous international reports already published at the time of his expulsion, his lawyer had clearly explained the situation regarding the systematic violation of the fundamental rights of asylum seekers in Greece. He had done this in support of the appeal lodged with the Aliens Appeals Board on 29 May 2009 and also in the appeal lodged with the Indictments Chamber of the Brussels Court of Appeal on 10 June 2009. The applicant considered that the Belgian authorities' argument that he could not claim to have been a victim of the deficiencies in the Greek asylum system before coming to Belgium was irrelevant. In addition to the fact that formal proof of this could not be adduced *in abstracto* and before the risk had materialised, the Belgian authorities should have taken the general situation into account and not taken the risk of sending him back.

325. In the applicant's opinion, in keeping with what had been learnt from the case of *T.I.* (dec., cited above) the application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against *refoulement* existed in Greece, with regard to the deficiencies in the procedure or the policy of direct or indirect *refoulement* to Afghanistan. Without such guarantees and in view of the evidence adduced by the applicant, the Belgian authorities themselves should have verified the risk the applicant faced in his country of origin, in accordance with Articles 2 and 3 of the Convention and with the Court's case-law (in particular the case of *NA. v. the United Kingdom*, no. 25904/07, 17 July 2008). In this case, however, the Belgian Government had taken no precautions before deporting him. On the contrary, the decision to deport him had been taken solely on the basis of the presumption – by virtue of the tacit acceptance provided for in the Dublin Regulation – that the Greek authorities would honour their obligations, without any individual guarantee concerning the applicant. The applicant saw this as a systematic practice of the Belgian authorities, who had always refused and continued to refuse to apply the sovereignty clause in the Dublin Regulation and not transfer people to Greece.

2. The Belgian Government

326. The Government submitted that in application of the Dublin Regulation Belgium was not responsible for examining the applicant's request for asylum, and it was therefore not their task to examine the applicant's fears for his life and his physical safety in Afghanistan. The Dublin Regulation had been drawn up with due regard for the principle of *non-refoulement* enshrined in the Geneva Convention, for fundamental rights and for the principle that the Member States were safe countries. Only in exceptional circumstances, on a case-by-case basis, did Belgium avail itself of the derogation from these principles provided for in Article 3 § 2 of the Regulation, and only where the person concerned showed convincingly that he was at risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3. Indeed, that approach was consistent with the Court's case-law, which required there to be a link between the general situation complained of and the applicant's individual situation (as in the cases of *Sultani*, cited above, *Thampibillai v. the Netherlands*, no. 61350/00, 17 February 2004, and *Y. v. Russia*, no. 20113/07, 4 December 2008).

327. The Belgian Government did not know in exactly what circumstances the sovereignty clause was used, as no statistics were provided by the Aliens Office, and when use was made of it no reasons were given for the decisions. However, in order to show that they did apply the sovereignty clause when the situation so required, the Government produced ten cases where transfers to the country responsible had been suspended for reasons related, by deduction, to the sovereignty clause. In half of those cases Poland was the country responsible for the applications, in two cases it was Greece and in the other cases Hungary and France. In seven cases the reason given was the presence of a family member in Belgium; in two, the person's health problems; and the last case concerned a minor. In the applicant's case Belgium had had no reason to apply the clause and no information showing that he had personally been a victim in Greece of treatment prohibited by Article 3. On the contrary, he had not told the Aliens Office that he had abandoned his asylum application or informed it of his complaints against Greece. Indeed, the Court itself had not considered it necessary to indicate an interim measure to the Belgian Government to suspend the applicant's transfer.

328. However, the Government pointed out that the order to leave the country had been issued based on the assurance that the applicant would not be sent back to Afghanistan without the merits of his complaints having been examined by the Greek authorities. Concerning access to the asylum procedure and the course of that procedure, the Government relied on the assurances given by the Greek authorities that they had finally accepted responsibility, and on the general information contained in the summary document drawn up by the Greek authorities and in the observations Greece had submitted to the Court in other pending cases. The Belgian authorities had noted, based on that information, that if an alien went through with an asylum application in Greece, the merits of the application would be examined on an individual basis, the asylum seeker could be assisted by a lawyer and an interpreter would be present at every stage of the proceedings. Remedies also existed, including an appeal to the Supreme Administrative Court. Accordingly, although aware of the possible deficiencies of the asylum system in Greece, the Government submitted that they had been sufficiently convinced of the efforts Greece was making to comply with Community law and its obligations in terms of human rights, including its procedural obligations.

329. As to the risk of *refoulement* to Afghanistan, the Government had also taken into account the assurances Greece had given the Court in *K.R.S. v. the United Kingdom* (dec. cited above) and the possibility for the applicant, once in Greece, to lodge an application with the Court and, if necessary, a request for the application of Rule 39. On the strength of these assurances, the Government considered that the applicant's transfer had not been in violation of Article 3.

B. Observations of the Governments of the Netherlands and the United Kingdom, and of the Office of the United Nations High Commissioner for Refugees, the Aire Centre and Amnesty International and the Greek Helsinki Monitor, intervening as third parties

330. According to the Government of the Netherlands, it did not follow from the possible deficiencies in the Greek asylum system that the legal protection afforded to asylum seekers in Greece was generally illusory, much less that the Member States should refrain from transferring people to Greece because in so doing they would be violating Article 3 of the Convention. It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards. The Government of the Netherlands therefore considered that they were fully assuming their responsibilities by making sure, through an official at their embassy in Athens, that any asylum seekers transferred would be directed to the asylum services at the international airport. In keeping with the Court's decision in *K.R.S.* (cited above), it was to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] (no. 45036/98, ECHR 2005 VI), in assessing the responsibility of the States when they applied Community law.

331. The Government of the United Kingdom emphasised that the Dublin Regulation afforded a fundamental advantage in speeding up the examination of applications, so that the persons concerned did not have time to develop undue social and cultural ties in a State. That being so, it should be borne in mind that calling to account under Article 3 the State responsible for the asylum application prior to the transfer, as in the present case, was bound to slow down the whole process no end. The Government of the United Kingdom were convinced that such complaints, which were understandable in cases of expulsion to a State not bound by the Convention, should be avoided when the State responsible for handling the asylum application was a party to the Convention. In such cases, as the Court had found in *K.R.S.* decision (cited above), the normal interpretation of the Convention would mean the interested parties lodging their complaints with the courts in the State responsible for processing the asylum application and subsequently, perhaps, to the Court. According to the United Kingdom Government, this did not absolve the transferring States of their responsibility for potential violations of the Convention, but it meant that their responsibility could be engaged only in wholly exceptional circumstances where it was demonstrated that the persons concerned would not have access to the Court in the State responsible for dealing with the asylum application. No such circumstances were present in the instant case, however.

332. In the opinion of the UNHCR, as they had already stated in their report published in April 2008, asylum seekers should not be transferred when, as in the present case, there was evidence that the State responsible for processing the asylum application effected transfers to high-risk countries, that the persons concerned encountered obstacles in their access to asylum procedures, to the effective examination of their applications and to an effective remedy, and where the conditions of reception could result in a violation of Article 3 of the Convention. Not transferring asylum seekers in these conditions was provided for in the Dublin Regulation itself and was fully in conformity with Article 33 of the Geneva Convention and with the Convention. The UNHCR stressed that this was not a theoretical possibility and that, unlike in Belgium, the courts in certain States had suspended transfers to Greece for the above-mentioned reasons. In any event, as the Court had clearly stated in the case of *T.I.* (dec. cited above), each Contracting State remained responsible under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.

333. The Aire Centre and Amnesty International considered that in its present form, without a clause on the suspension of transfers to countries unable to honour their international obligations in asylum matters, the Dublin Regulation exposed asylum seekers to a risk of *refoulement* in breach of the Convention and the Geneva Convention. They pointed out considerable disparities in the way European Union Member States applied the Regulation and the domestic courts assessed the lawfulness of the transfers when it came to evaluating the risk of violation of fundamental rights, in particular when the State responsible for dealing with the asylum application had not properly transposed the other Community measures relating to asylum. The Aire Centre and Amnesty International considered that States which transferred asylum seekers had their share of responsibility in the way the receiving States treated them, in so far as they could prevent human rights violations by availing themselves of the sovereignty clause in the Regulation. The possibility for the European Commission to take action against the receiving State for failure to honour its obligations was not, in their opinion, an effective remedy against the violation of the asylum seekers' fundamental rights. Nor were they convinced, as the CJEU had not pronounced itself on the lawfulness of Dublin transfers when they could lead to such violations, of the efficacy of the preliminary question procedure introduced by the Treaty of Lisbon.

334. GHM pointed out that at the time of the applicant's expulsion there had already been a substantial number of documents attesting to the deficiencies in the asylum procedure, the conditions in which asylum seekers were received and the risk of direct or indirect *refoulement* to Turkey. GHM considered that the Belgian authorities could not have been unaware of this, particularly as the same documents had been used in internal procedures to order the suspension of transfers to Greece. According to GHM, the documents concerned, particularly those of the UNHCR, should make it possible to reverse the Court's presumption in *K.R.S.* (dec. cited above) that Greece fulfilled its international obligations in asylum matters.

C. The Court's assessment

1. Admissibility

335. The Belgian Government criticised the applicant for not having correctly used the procedure for applying for a stay of execution under the extremely urgent procedure, not having lodged an appeal with the Aliens Appeals Board to have the order to leave the country set aside and not having lodged an administrative appeal on points of law with the *Conseil d'Etat*. They accordingly submitted that he had not exhausted the domestic remedies and invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.

336. The Court notes that the applicant also complained of not having had a remedy that met the requirements of Article 13 of the Convention for his complaints under Articles 2 and 3, and maintained, in this context, that the remedies in question were not effective within the meaning of that provision (see paragraphs 370-377 below). It considers that the Government's objection of non-exhaustion of domestic remedies should be joined to the merits of the complaints under Article 13 taken in conjunction with Articles 2 and 3 of the Convention and examined together.

337. That said, the Court considers that this part of the application cannot be rejected for non-exhaustion of domestic remedies (see paragraphs 385-396 below) and that it raises complex issues of law and fact which cannot be determined without an examination of the merits; it follows that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. The responsibility of Belgium under the Convention

338. The Court notes the reference to the *Bosphorus* judgment by the Government of the Netherlands in their observations lodged as third-party interveners (see paragraph 330 above).

The Court reiterated in that case that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (see *Bosphorus*, cited above, § 152). The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (*ibid*., § 153). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion (*ibid*., §§ 155-57).

The Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system (*ibid*., § 165). In reaching that conclusion it attached great importance to the role and powers of the ECJ – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (*ibid*., § 160). The Court also took care to limit the scope of the *Bosphorus* judgment to Community law in the strict sense – at the time the "first pillar" of European Union law (*ibid*., § 72).

339. The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called "sovereignty" clause. In such a case the State concerned becomes the Member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility.

340. The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.

3. Merits of the complaints under Articles 2 and 3 of the Convention

(a) The *T.I.* and *K.R.S.* decisions

341. In these two cases the Court had the opportunity to examine the effects of the Dublin Convention, then the Dublin Regulation with regard to the Convention.

342. The case of *T.I.* (dec., cited above) concerned a Sri Lankan national who had unsuccessfully sought asylum in Germany and had then submitted a similar application in the United Kingdom. In application of the Dublin Convention, the United Kingdom had ordered his transfer to Germany

In its decision the Court considered that indirect removal to an intermediary country, which was also a Contracting Party, left the responsibility of the transferring State intact, and that State was required, in accordance with the well-established case-law, not to deport a person where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.

Furthermore, the Court reiterated that where States cooperated in an area where there might be implications as to the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned (see, among other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I).

When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.

Although in the *T. I.* case the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker it was about to transfer to that country, the fact that the asylum procedure in Germany apparently complied with the Convention, and in particular Article 3, enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to that Article. The Court considered that there was no reason in that particular case to believe that Germany would have failed to honour its obligations under Article 3 of the Convention and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country.

343. That approach was confirmed and developed in the *K.R.S.* decision (cited above). The case concerned the transfer by the United Kingdom authorities, in application of the Dublin Regulation, of an Iranian asylum seeker to Greece, through which country he had passed before arriving in the United Kingdom in 2006. Relying on Article 3 of the Convention, the applicant complained of the deficiencies in the asylum procedure in Greece and the risk of being sent back to Iran without the merits of his asylum application being examined, as well as the reception reserved for asylum seekers in Greece.

After having confirmed the applicability of the *T.I.* case-law to the Dublin Regulation (see also on this point *Stapleton v. Ireland* (dec.), no. 56588/07, § 30, ECHR 2010-...), the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention.

In the Court's opinion, in view of the information available at the time to the United Kingdom Government and the Court, it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin.

Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court.

(b) Application of these principles to the present case

344. The Court has already stated its opinion that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention (see paragraphs 296-297 above).

345. The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the *K.R.S.* case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case.

346. The Court disagrees with the Belgian Government's argument that, because he failed to

voice them at his interview, the Aliens Office had not been aware of the applicant's fears in the event of his transfer back to Greece at the time when it issued the order for him to leave the country.

347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its *K.R.S.* decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.

348. The authors of these documents are the UNHCR and the European Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 147, ECHR 2008-...).

354. The Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice.

355. The Court next rejects the Government's argument that the Court itself had not considered it necessary to indicate an interim measure under Rule 39 to suspend the applicant's transfer. It reiterates that in cases such as this, where the applicant's expulsion is imminent at the time when the matter is brought to the Court's attention, it must take an urgent decision. The measure indicated will be a protective measure which on no account prejudges the examination of the application under Article 34 of the Convention. At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so (see, *mutatis mutandis*, *Paladi v. Moldova* [GC], no. 39806/05, § 89, ECHR 2009-...). In the instant case, moreover, the letters sent by the Court clearly show

that, fully aware of the situation in Greece, it asked the Greek Government to follow the applicant's case closely and to keep it informed (see paragraphs 32 and 39, above).

356. The respondent Government, supported by the third-party intervening Governments, lastly submitted that asylum seekers should lodge applications with the Court only against Greece, after having exhausted the domestic remedies in that country, if necessary requesting interim measures.

357. While considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory. The Court notes that the applicant is represented before it by the lawyer who defended him in Belgium. Considering the number of asylum applications pending in Greece, no conclusions can be drawn from the fact that some asylum seekers have brought cases before the Court against Greece. In this connection it also takes into account the very small number of Rule 39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in the other States.

358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. The Government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (see, *mutatis mutandis*, *Saadi*, cited above, § 132).

(c) Conclusion

360. Having regard to the above considerations, the Court finds that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention.

361. Having regard to that conclusion and to the circumstances of the case, the Court finds that there is no need to examine the applicant's complaints under Article 2.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

362. The applicant alleged that because of the conditions of detention and existence to which asylum seekers were subjected in Greece, by returning him to that country in application of the Dublin Regulation the Belgian authorities had exposed him to treatment prohibited by Article 3 of the Convention, cited above.

363. The Government disputed that allegation, just as it refused to see a violation of Article 3 because of the applicant's expulsion and the ensuing risk resulting from the deficiencies in the asylum procedure.

364. The Court considers that the applicant's allegations under the above-cited provision of the Convention raise complex issues of law and fact which cannot be determined without an examination of the merits; it follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

365. On the merits, the Court reiterates that according to its well-established case-law the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 125, § 103; *H.L.R. v. France*, judgment of 29 April 1997, Reports 1997-III, § 34; *Jabari* cited above, § 38; *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, ECHR 2007-I (extracts), no. 1948/04; and *Saadi*, cited above, § 152).

366. In the instant case the Court has already found the applicant's conditions of detention and living conditions in Greece degrading (see paragraphs 233, 234, 263 and 264 above). It

notes that these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources (see paragraphs 162-164 above). It also wishes to emphasise that it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece. It has established that the procedure before the Aliens Office made no provision for such explanations and that the Belgian authorities applied the Dublin Regulation systematically (see paragraph 352 above).

367. Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.

368. That being so, there has been a violation of Article 3 of the Convention.

VI. ALLEGED VIOLATION BY BELGIUM OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE LACK OF AN EFFECTIVE REMEDY AGAINST THE EXPULSION ORDER

369. The applicant maintained that there was no remedy under Belgian law, as required by Article 13 of the Convention, cited above, by which he could have complained about the alleged violations of Articles 2 and 3 of the Convention.

A. The parties' submissions

1. The applicant

370. The applicant submitted that he had acted as swiftly as possible in the circumstances in lodging a first application for a stay of execution of the expulsion measure under the extremely urgent procedure. He had come up against practical obstacles, however, which had hindered his access to the urgent procedure.

371. First, he explained that on the day the order to leave the country was issued, on 19 May 2009, he was taken into custody and placed in a closed centre for illegal aliens. Not until five days later, after the long Ascension Day weekend, had a lawyer been appointed, at his request, by the Belgian authorities, or had the Belgian Committee for Aid to Refugees at least been able to identify that lawyer to pass on general information to him concerning Dublin asylum seekers. This first lawyer, who was not a specialist in asylum cases, lodged an application for a stay of execution under the extremely urgent procedure after having had the file for three days, which in the applicant's opinion was by no means an excessively long time.

372. Secondly, the case had been scheduled for examination only one hour after the application was lodged, preventing the applicant's lawyer, whose office was 130 km away from the Aliens Appeals Board, from attending the hearing. According to the applicant, his counsel had had no practical means of having himself represented because it was not the task of the permanent assistance service of the "aliens" section of the legal aid office to replace in an emergency lawyers who could not attend a hearing. In support of this affirmation he adduced a note written by the president of the section concerned. The applicant further submitted that as his departure was not imminent but scheduled for 27 May, his request might well have been rejected anyway because there was no urgency.

373. In addition to the practical inaccessibility of the urgent procedure in his case, the applicant submitted that in any event appeals before the Aliens Appeals Board were not an effective remedy within the meaning of Article 13 of the Convention in respect of the risk of violations of Articles 2 and 3 in the event of expulsion. It could therefore not be held against him that he had failed to exhaust that remedy.

374. First, he submitted that at the time of his removal his request for a stay of execution had no chance of succeeding because of the constant case-law of certain divisions of the Aliens Appeals Board, which systematically found that there was no virtually irreparable damage because it was to be presumed that Greece would fulfil its international obligations in asylum matters, and that presumption could not be rebutted based on reports on the general situation in Greece, without the risk to the person being demonstrated *in concreto*. Only a handful of judgments to the contrary had been delivered, but in a completely unforeseeable manner and with no explanation of the reasons.

375. In the applicant's opinion this increase in the burden of proof where the individuals concerned demonstrated that they belonged to a vulnerable group who were systematically subjected in Greece to treatment contrary to Article 3 of the Convention made appeals to the Aliens Appeals Board totally ineffective. Subsequent events had proved him right as he had effectively suffered, *in concreto*, from the very risks of which he had complained.

376. Subsequently, once his application under the extremely urgent procedure had been rejected, there had no longer been any point in the applicant continuing the proceedings on the merits as these would have had no suspensive effect and could not have prevented his removal.

In fact it was the constant practice of the Aliens Appeals Board to dismiss such appeals because in such conditions the applicants no longer had any interest in having the measure set aside. Lastly, even if the Aliens Appeals Board had not declared the case inadmissible on that ground, the applicant could not have had the order to leave the country set aside because of the aforesaid constant case-law.

377. The applicant added that where administrative appeals on points of law against judgments of this type were lodged with the *Conseil d'Etat* the latter did not question the approach of the Aliens Appeals Board and considered that the situation raised no issue under Article 13 of the Convention.

2. The Belgian Government

378. The Belgian Government affirmed that the applicant had had several remedies open to him before the domestic courts that met the requirements of Article 13 of the Convention, but he had not properly exhausted them.

379. On the question of the extremely urgent procedure for applying for a stay of execution the Government pointed out that appeals could be lodged with the Aliens Appeals Board at any time, without interruption and with suspensive effect, and that the Court had confirmed the effectiveness of the procedure in the case of *Quraishi v. Belgium* (application no. 6130/08, decision of 12 May 2009). They alleged that the applicant had placed himself in an urgent situation by appealing to the Aliens Appeals Board only a few hours before his departure, when he had been taken into custody ten days earlier, under an order to leave the country. Penalising an applicant's lack of diligence was a long-standing practice of the *Conseil d'Etat*, and was justified by the exceptional nature of the procedure, which reduced the rights of the defence and the investigation of the case to a minimum. The fact that the flight had not been scheduled until 27 May was immaterial because, except in the example given by the applicant, the constant case-law of the Aliens Appeals Board showed that deprivation of liberty sufficed to justify the imminent nature of the danger.

380. Furthermore there was the fact that, in view of its urgency, the case had been scheduled for immediate examination but no one had attended the hearing, even though the applicant's counsel could have asked the permanent service of the legal aid office in Brussels to represent him before the Aliens Appeals Board.

381. The Government disputed the applicant's argument that his request for a stay of execution had no chance of succeeding, producing five of the Board's judgments from 2008 and 2009 ordering the suspension of transfers to Greece under the extremely urgent procedure on the grounds that, in view of the gravity of the applicants' complaints under Article 3 of the Convention, the order to leave the country was not, *prima facie*, sufficiently well-reasoned. According to the Government it was always in the applicants' interest to proceed with their applications for judicial review so as to give the Aliens Appeals Board and then the *Conseil d'Etat* an opportunity to propose a solution and analyse the lawfulness of the impugned measures.

382. The fact that the applicant had been removed in the interim should not have deterred him from continuing. In support of that affirmation the Government cited the Aliens Appeals Board's judgment no. 28.233 of 29 May 2009, which had declared an appeal admissible even though the applicant had already been transferred. The application was subsequently dismissed because there had no longer been any interest at stake for the applicant as the application concerned the order to leave the country and he had not demonstrated *in concreto* that there had been any violation of Article 3 of the Convention.

383. Concerning the merits, the Government confirmed that, as it did when determining the existence of irreparable damage at the suspension stage, the constant case-law of the Aliens Appeals Board, which was in fact based on that of the Court, required the applicants to demonstrate the concrete risk they faced. However, just as the effectiveness of a remedy within the meaning of Article 13 did not depend on the certainty of it having a favourable outcome, the Government submitted that the prospect of an unfavourable outcome on the merits should not be a consideration in evaluating the effectiveness of the remedy.

384. The UNHCR, intervening as a third party, considered that the constant case-law of the Aliens Appeals Board and the *Conseil d'Etat* effectively doomed to failure any application for the suspension or review of an order to leave the country issued in application of the Dublin Regulation, as the individuals concerned were unable to provide concrete proof both that they faced an individual risk and that it was impossible for them to secure protection in the receiving country. In adopting that approach the Belgian courts automatically relied on the Dublin Regulation and failed to assume their higher obligations under the Convention and the international law on refugees.

B. The Court's assessment

385. The Court has already found that the applicant's expulsion to Greece by the Belgian authorities amounted to a violation of Article 3 of the Convention (see paragraphs 359 and 360

above). The applicant's complaints in that regard are therefore "arguable" for the purposes of Article 13.

386. The Court notes first of all that in Belgian law an appeal to the Aliens Appeals Board to set aside an expulsion order does not suspend the enforcement of the order. However, the Government pointed out that a request for a stay of execution could be lodged before the same court "under the extremely urgent procedure" and that unlike the extremely urgent procedure that used to exist before the *Conseil d'Etat*, the procedure before the Aliens Appeals Board automatically suspended the execution of the expulsion measure by law until the Board had reached a decision, that is, for a maximum of seventy-two hours.

387. While agreeing that that is a sign of progress in keeping with the *Čonka* judgment, cited above (§§ 81-83, confirmed by the *Gebremedhin* judgment, cited above, §§ 66-67), the Court reiterates that it is also established in its case-law (paragraph 293 above) that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation.

388. In the Court's view the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.

389. However, the extremely urgent procedure leads precisely to that result. The Government themselves explain that this procedure reduces the rights of the defence and the examination of the case to a minimum. The judgments of which the Court is aware (paragraphs 144 and 148 above) confirm that the examination of the complaints under Article 3 carried out by certain divisions of the Aliens Appeals Board at the time of the applicant's expulsion was not thorough. They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention.

390. The Court concludes that the procedure for applying for a stay of execution under the extremely urgent procedure does not meet the requirements of Article 13 of the Convention.

391. The fact that a few judgments, against the flow of the established case-law at the time, have suspended transfers to Greece (see paragraph 149 above) does not alter this finding as the suspensions were based not on an examination of the merits of the risk of a violation of Article 3 but rather on the Appeals Board's finding that the Aliens Office had not given sufficient reasons for its decisions.

392. The Court further notes that the applicant also faced several practical obstacles in exercising the remedies relied on by the Government. It notes that his request for a stay of execution under the extremely urgent procedure was rejected on procedural grounds, namely his failure to appear. Contrary to what the Government suggest, however, the Court considers that in the circumstances of the case, this fact cannot be considered to reveal a lack of diligence on the applicant's part. It fails to see how his counsel could possibly have reached the seat of the Aliens Appeals Board in time. As to the possibility of requesting assistance from a round-the-clock service, the Court notes in any event that the Government have supplied no proof of the existence of such a service in practice.

393. Regarding the usefulness of continuing proceedings to have the order to leave the country set aside even after the applicant had been transferred, the Court notes that the only example put forward by the Government (see paragraphs 151 and 382) confirms the applicant's belief that once the person concerned has been deported the Aliens Appeals Board declares the appeal inadmissible as there is no longer any point in seeking a review of the order to leave the country. While it is true that the Aliens Appeals Board did examine the complaints under Article 3 of the Convention in that judgment, the Court fails to see how, without its decision having suspensive effect, the Aliens Appeals Board could still offer the applicant suitable redress even if it had found a violation of Article 3.

394. In addition, the Court notes that the parties appear to agree to consider that the applicant's appeal had no chance of success in view of the constant case-law, mentioned above, of the Aliens Appeals Board and the *Conseil d'Etat*, and of the impossibility for the applicant to demonstrate *in concreto* the irreparable nature of the damage done by the alleged potential violation. The Court reiterates that while the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining

adequate redress raises an issue under Article 13 (see *Kudla*, cited above, § 157).

395. Lastly, the Court points out that the circumstances of the present case clearly distinguish it from the *Quraishi* case relied on by the Government. In the latter case, which concerns events dating back to 2006 and proceedings before the Aliens Appeals Board in 2007, that is to say a few months after the Board began its activities, the applicants had obtained the suspension of their expulsion through the intervention of the courts. What is more, they had not at that stage been expelled when the Court heard their case and the case-law of the Aliens Appeals Board in Dublin cases had not by then been established.

396. In view of the foregoing, the Court finds that there has been a violation of Article 13 taken in conjunction with Article 3. It follows that the applicant cannot be faulted for not having properly exhausted the domestic remedies and that the Belgian Government's preliminary objection of non-exhaustion (see paragraph 335 above) cannot be allowed.

397. Having regard to that conclusion and to the circumstances of the case, the Court considers that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2.

VII. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

398. Article 46 of the Convention provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

399. Under Article 46 of the Convention the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties, the Committee of Ministers being responsible for supervising the execution of the judgments. This means that when the Court finds a violation the respondent State is legally bound not only to pay the interested parties the sums awarded in just satisfaction under Article 41, but also to adopt the necessary general and/or, where applicable, individual measures. As the Court's judgments are essentially declaratory in nature, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in order to discharge its legal obligation under Article 46 of the Convention, provided that those means are compatible with the conclusions contained in the Court's judgment. In certain particular situations, however, the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the – often systemic – situation that gave rise to the finding of a violation (see, for example, *Öcalan v. Turkey* [GC],no. 46221/99, § 210, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it (see *Assanidzé v. Goorgia* [GC], no. 71503/01, 8 April 2004, § 198, ECHR 2004-II; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, of 30 June 2009, §§ 85 and 88, ECHR 2009-..).

400. In the instant case the Court considers it necessary to indicate some individual measures required for the execution of the present judgment in respect of the applicant, without prejudice to the general measures required to prevent other similar violations in the future (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 193, ECHR 2004-V).

401. The Court has found a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece combined with the prolonged uncertainty in which he lived and the lack of any prospect of his situation improving (see paragraph 263 above). It has also found a violation of Article 13 in conjunction with Article 3 of the Convention because of the shortcomings in the asylum procedure as applied to the applicant and the risk of *refoulement* to Afghanistan without any serious examination of his asylum application and without his having had access to an effective remedy (see paragraph 322 above).

402. Having regard to the particular circumstances of the case and the urgent need to put a stop to these violations of Articles 13 and 3 of the Convention, the Court considers it incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that meets the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

B. Article 41 de la Convention

403. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial

reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Non-pecuniary damage

(a) In respect of Greece

404. The applicant claimed 1,000 euros (EUR) in compensation for the non-pecuniary damage sustained during the two periods of detention.

405. The Greek Government considered this claim ill-founded.

406. The Court has found that the applicant's conditions of detention violated of Article 3 of the Convention. It considers that the applicant must have experienced certain distress which cannot be compensated for by the Court's findings of violations alone. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 1,000 in respect of non-pecuniary damage.

(b) In respect of Belgium

407. The applicant claimed EUR 31,825 in compensation for the non-pecuniary damage caused on the one hand by his detention in an open centre then in a closed centre in Belgium before his transfer to Greece (EUR 6,925) and on the other hand by the decision of the Belgian authorities to transfer him to Greece (EUR 24,900).

408. The Belgian Government argued that if the Court were to find Belgium liable the applicant could take legal action in the Belgian courts to obtain compensation for any non-pecuniary damage caused by his detention. In any event the Government considered the claim ill-founded, the applicant having failed to demonstrate any fault on the part of the State or to establish any causal link between the alleged fault and the non-pecuniary damage allegedly sustained.

409. The Court reiterates that it can award sums in respect of the just satisfaction provided for in Article 41 where the loss or damage claimed have been caused by the violation found, while the State is not required to pay sums in respect of damage for which it is not responsible (see *Saadi*, cited above, § 186). In the present case the Court has not found a violation of the Convention because of the applicant's detention in Belgium prior to his transfer to Greece. It accordingly rejects this part of the claim.

410. Concerning the alleged damage because of the transfer to Greece, the Court has found that the transfer gave rise to a violation of Article 3 of the Convention both because it exposed the applicant to treatment prohibited by that provision, in detention and during his stay in Greece, and because it exposed the applicant to the risks inherent in the deficiencies in the asylum procedure in Greece. It reiterates that the fact that the applicant could claim compensation in the Belgian courts does not oblige the Court to reject the claim as being ill-founded (see *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 16, Series A no. 14).

411. The Court considers that the applicant must have experienced certain distress for which the Court's findings of violations alone cannot constitute just satisfaction. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 24,900 in respect of non-pecuniary damage.

2. Costs and expenses

(a) In respect of Greece

412. The applicant claimed the reimbursement of the cost of his defence before the Court against the Greek Government. According to the list of fees and expenses submitted by the applicant's lawyer, the costs and expenses as at 15 March 2010 totalled EUR 3,450 based on an hourly fee of EUR 75. The lawyer indicated that he had agreed with the applicant that the latter would pay him by instalments based on the above-mentioned hourly fee if he won the case before the Court.

413. The Greek Government found this claim excessive and unsubstantiated.

414. The Court considers it established that the applicant effectively incurred the costs he claimed in so far as, being a client, he entered into a legal obligation to pay his legal representative on an agreed basis (see, *mutatis mutandis*, *Sanoma Uitgevers B.V. v. the Netherlands*, no. 38224/03, § 110, 31 March 2009). Considering also that the costs and expenses concerned were necessary and reasonable as to quantum, the Court awards the applicant EUR 3,450.

(b) In respect of Belgium

415. The applicant claimed the reimbursement of his costs and expenses before the Belgian courts and before the Court. The applicant's lawyer submitted a list of fees and expenses according to which the costs and expenses as at 15 March 2010 totalled EUR 7,680 based on an hourly fee of EUR 75, EUR 1,605 were claimed for the proceedings before the Belgian courts and EUR 6,075 for the proceedings before the Court against Belgium.

416. The Belgian Government invited the Court to reject the claim. They submitted that the applicant was entitled to free legal aid and to assistance with legal costs. It had therefore been unnecessary for him to incur any costs. His lawyer could obtain compensation for any costs incurred before the Belgian courts and before the Court in conformity with the provisions of the Judicial Code concerning legal aid. The Code provided for a system of reimbursement in the form of "points" corresponding to the services provided by the lawyer. In 2010 one point corresponded to EUR 26.91. The figure had been EUR 23.25 in 2009. Had these provisions been complied with the lawyer should already have been authorised to receive payment for the costs incurred in 2009. The Government also pointed out that under Article 1022 of the Judicial Code concerning reimbursement of legal costs, the party which lost the case was required to pay all or part of the legal costs of the other party. In cases where the proceedings could not be evaluated in monetary terms, the sum payable was determined by the courts. Where legal aid was granted and the costs awarded in the proceedings were higher, the Treasury could recover the sum paid in legal aid.

417. The applicant's lawyer confirmed that he had been appointed by the Belgian State as a legal aid lawyer, but only to defend the applicant before the first-instance court. For this he was entitled to "ten points". He said that he had not yet received any payment for legal aid. For the other proceedings he had agreed with the applicant that the applicant would pay him by instalments based on the above-mentioned hourly fee if he won the case before the Court. That commitment had been honoured in part. According to the applicant, there was no danger of the Belgian authorities paying him too much compensation because the procedural costs awarded were deducted from the legal aid payable. It followed that if the former exceeded the latter his lawyer would ask the legal aid office to stop the legal aid and that if the costs and expenses awarded by the Court were higher than the amount awarded in legal aid, his lawyer would receive nothing in terms of legal aid.

418. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, among many other authorities, *Sanoma Uitgevers B.V. v. the Netherlands*, cited above, 109).

419. The Court first considers the costs and expenses relating to the proceedings before the domestic courts. It notes that the applicant has submitted no breakdown of the sum claimed in respect of the different proceedings brought. This prevents it from determining precisely what amounts correspond to the violations found in the instant case and to what extent they have been or could be covered by the legal aid. Because of this lack of clarity (see, *mutatis mutandis*, *Musiał v. Poland* [GC], no. 24557/94, § 61, ECHR 1999-II), the Court rejects these claims.

420. Turning its attention to the costs and expenses incurred in the proceedings before it against Belgium, the Court reiterates that it does not consider itself bound by domestic scales and practices, even if it may take inspiration from them (see *Venema v. the Netherlands*, no. 35731/97, § 116, ECHR 2002-X). In any event, for the same reasons as in respect of Greece (see paragraph 414 above), it awards the applicant EUR 6,075.

(c) In respect of Belgium and Greece

421. The applicant lastly claimed the reimbursement of the costs and fees incurred in connection with the hearing before the Court. According to the list of fees and expenses submitted by the applicant's lawyer, they amounted to EUR 2,550 for the pleadings and their preparation (at an hourly rate of EUR 75). Without submitting any receipts, he also claimed the reimbursement of EUR 296.74 EUR for his lawyer's travel to and accommodation in Strasbourg.

422. According to its established case-law, the Court rejects the part of the claim which is not substantiated by the requisite receipts.

423. For the remainder, considering it established that the costs and expenses claimed were necessarily incurred and were reasonable as to quantum, it awards the applicant EUR 2,550. Having regard to the responsibility for the different violations of the Convention found by the Court, Belgium and Greece will each pay half of that sum.

(d) Default interest

424. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins to the merits*, by sixteen votes to one, the preliminary objections raised by the Greek Government and *rejects* them;

2. *Declares admissible*, unanimously, the complaint under Article 3 of the Convention concerning the conditions of the applicant's detention in Greece;

3. *Holds*, unanimously, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's conditions of detention;

4. *Declares admissible*, by a majority, the complaint under Article 3 of the Convention concerning the applicant's living conditions in Greece;

5. *Holds*, by sixteen votes to one, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece;

6. *Declares admissible*, unanimously, the complaint against Greece under Article 13 taken in conjunction with Article 3 of the Convention;

7. *Holds*, unanimously, that there has been a violation by Greece of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy;

8. *Holds*, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;

9. *Joins to the merits*, unanimously, the preliminary objection raised by the Belgian Government, *rejects* it and *declares admissible*, unanimously, the complaints lodged against Belgium;

10. *Holds*, by sixteen votes to one, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State;

11. *Holds*, unanimously, that there is no need to examine the applicant's complaints under Article 2 of the Convention;

12. *Holds*, by fifteen votes to two, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article;

13. *Holds*, unanimously, that there has been a violation by Belgium of Article 13 taken in conjunction with Article 3 of the Convention;

14. *Holds*, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;

15. *Holds*, unanimously,

(a) that the Greek State is to pay the applicant, within three months, the following amounts,

(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(ii) EUR 4,725 (four thousand seven hundred and twenty-five euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

16. *Holds*,

(a) by fifteen votes to two, that the Belgian State is to pay the applicant, within three months, EUR 24,900 (twenty-four thousand nine hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) by sixteen votes to one, that the Belgian State is to pay the applicant, within three months, EUR 7,350 (seven thousand three hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

17. *Rejects*, unanimously, the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 2011.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Rozakis;

(b) Concurring opinion of Judge Villiger;

(c) Partly concurring and partly dissenting opinion of Judge Sajó;

(d) Partly dissenting opinion of Judge Bratza.

b) ECJ C-19/08, Migrationsverket, 29 January 2009

JUDGMENT OF THE COURT (Fourth Chamber)

29 January 2009 (*)

(Right of asylum – Regulation (EC) No 343/2003 – Taking back by a Member State of an asylum seeker whose application has been refused and who is in another Member State where he has submitted a fresh asylum application – Start of the period for implementation of transfer of the asylum seeker – Transfer procedure the subject-matter of an appeal having suspensive effect)

In Case C-19/08,

REFERENCE under Articles 68(1) EC and 234 EC for a preliminary ruling from the Kammarrätten i Stockholm, Migrationsöverdomstolen (Sweden), made by decision of 17 January 2008, received at the Court on 21 January 2008, in the proceedings

Migrationsverket

v

Edgar Petrosian,

Nelli Petrosian,

Svetlana Petrosian,

David Petrosian,

Maxime Petrosian,

THE COURT (Fourth Chamber),

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 20(1)(d) and Article 20(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

2 The reference has been made in the course of proceedings between Mr and Mrs Petrosian and their three children ('the members of the Petrosian family'), who are Armenian nationals (except for Nelli Petrosian, who is a Ukrainian national), and the Migrationsverket (Swedish Immigration Board), which is responsible for matters relating to immigration and for examining their asylum applications, concerning that board's decision ordering their transfer to another Member State, where their initial asylum application had been refused.

Legal framework

Community legislation

3 The fourth recital in the preamble to Regulation No 343/2003 states:

'[A clear and workable method for determining the Member State responsible for the examination of an asylum application] should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.'

4 The 15th recital in the preamble to the regulation reads as follows:

'The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)]. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.'

5 Article 1 of Regulation No 343/2003 provides:

'This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.'

6 Article 3(1) of that regulation provides:

'Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

7 Article 4 of that regulation states:

'1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

...

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.

...'

8 In Chapter V of Regulation No 343/2003, concerning taking charge of and taking back asylum seekers, Article 16 is worded as follows:

'The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

…

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

...'.

9 Article 20 of Regulation No 343/2003 provides:

'1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time-limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one-month period or the two-weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;

(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time-limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he

is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.

If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time-limit.

2. Where the transfer does not take place within the six-months' time-limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time-limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of 18 months if the asylum seeker absconds.

...'

National legislation

10 Chapter 1, Paragraph 9, of Law 2005:716 on Aliens (utlänningslagen 2005:716) states that the provisions on deportation of asylum seekers laid down in that law also apply *mutatis mutandis* to decisions on transfer under Regulation No 343/2003.

11 Chapter 4, Paragraph 6, and Chapter 8, Paragraphs 4 and 7, of that law provide that decisions on granting of political refugee status and on deportation of asylum seekers are to be taken by the Migrationsverket.

12 Chapter 14, Paragraph 3, of that law provides that appeals against decisions of the Migrationsverket lie to a Migrationsdomstol (County Administrative Court ruling on immigration matters) if the decision involves, inter alia, deportation of an asylum seeker.

13 The first and third subparagraphs of Chapter 16, Paragraph 9, of that law provide that appeals against decisions of a Migrationsdomstol lie to the Migrationsöverdomstolen (Court of Appeal in immigration matters), against whose decisions there is no appeal.

14 Paragraph 28 of Law 1971:291 on administrative procedure (förvaltningsprocesslagen 1971:291) provides that courts which hear appeals can order that the decision under appeal, if it is immediately enforceable, is not to be enforced until further notice and, in any event, not until a ruling has been made on the merits of the case.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 On 22 March 2006 the members of the Petrosian family were in Sweden and applied for asylum there.

16 On examination of the family's application for asylum it became apparent that the family had earlier applied for asylum in, inter alia, France. The Migrationsverket therefore requested, on the basis of Article 16(1)(e) of Regulation No 343/2003, that the French authorities take the members of the Petrosian family back.

17 The French authorities did not reply to the Migrationsverket's request within the period laid down in Article 20(1)(b) of Regulation No 343/2003, whereupon the Migrationsverket informed them that the French Republic, in accordance with Article 20(1)(c) of that regulation, was deemed to have consented to take back the members of the Petrosian family.

18 Subsequently, the French authorities confirmed to the Migrationsverket that they would take the family back. Against that background, the Migrationsverket decided on 1 August 2006 that the members of the Petrosian family should be transferred to France on the basis of Article 20(1)(d) and (e) of Regulation No 343/2003.

19 The members of the Petrosian family appealed against the decision of the Migrationsverket to the Länsrätten i Skåne län, Migrationsdomstolen (Skåne County Administrative Court, ruling on immigration matters), and claimed that their application for asylum should be examined in Sweden.

20 On 23 August 2006, that court decided to stay execution of the transfer of the members of the Petrosian family to France pending its final decision in the case or until it decided otherwise. It gave a final ruling in the case by its judgment of 8 May 2007, dismissing the appeal and ordering that the decision to suspend the transfer of the family to France should no longer apply.

21 The members of the Petrosian family appealed against the judgment of the Länsrätten i Skåne län, Migrationsdomstolen, to the Kammarätten i Stockholm, Migrationsöverdomstolen (Court of Appeal in immigration matters, Stockholm), and claimed that the decision for transfer to

France should be annulled or, in the alternative, that the case should be referred back to the Länsrätten i Skåne län, on grounds of procedural error.

22 On 10 May 2007 the Kammarrätten i Stockholm, Migrationsöverdomstolen, decided to stay execution of the transfer to France pending its final decision in the case or until it decided otherwise.

23 On 16 May 2007 that court gave a final ruling in the case, setting aside the judgment of the Länsrätten i Skåne län, Migrationsdomstolen, and referring the case back to it, on grounds of procedural error relating to the composition of the bench which gave judgment in the case. The Kammarrätten i Stockholm, Migrationsöverdomstolen, further ordered that the decision to transfer the Petrosian family to France was not to be carried out before the Länsrätten i Skåne län, Migrationsdomstolen, had given final judgment on the merits of the case or ordered otherwise.

24 The Länsrätten i Skåne län, Migrationsdomstolen, gave a fresh ruling in the case on 29 June 2007, by which it annulled the decision of the Migrationsverket ordering the transfer of the members of the Petrosian family to France and referred the case back to the Migrationsverket for reassessment. In its reasons for judgment, the Länsrätten i Skåne län, Migrationsdomstolen, referred to a leading judgment of the Kammarrätten i Stockholm, Migrationsöverdomstolen, of 14 May 2007, in which the latter held that Article 20(1)(d) of Regulation No 343/2003, under which transfer is to be carried out at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect, is to be interpreted as meaning that the period for implementing the transfer is to run from the day of the decision provisionally to suspend execution.

25 The Länsrätten i Skåne län, Migrationsdomstolen, decided on 23 August 2006 to suspend execution of the decision, which meant that the time-limit for execution of the transfer expired, in its view, on 24 February 2007, from which date (i) responsibility for examining the applications for asylum of the members of the Petrosian family lay once more with the Kingdom of Sweden pursuant to Article 20(2) of Regulation No 343/2003; and (ii) the persons concerned could no longer be transferred to France.

26 The Migrationsverket appealed against the judgment of the Länsrätten i Skåne län, Migrationsdomstolen, before the Kammarrätten i Stockholm, Migrationsöverdomstolen, on 9 July 2007. It argued before that court that, following the adoption of a suspensive decision, the period for implementation of the transfer was suspended, with the result that it would run for six months as from the date the suspended decision would once again be enforceable.

27 In those circumstances, the Kammarrätten i Stockholm, Migrationsöverdomstolen, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Article 20(1)(d) and Article 20(2) of … Regulation No 343/2003 … to be interpreted as meaning that responsibility for the examination of an application for asylum passes to the Member State where the application was lodged if the transfer is not carried out within six months after a temporary decision has been made to suspend the transfer and irrespective of when the final decision is made on whether the transfer is to be carried out?'

The question referred for a preliminary ruling

28 By its question, the national court asks, essentially, whether Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 are to be interpreted as meaning that, where, in the context of a procedure to transfer an asylum seeker, the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, or only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent the implementation from taking place.

Observations submitted to the Court

29 The eight governments which have submitted written observations in the present case, as well as the Commission of the European Communities, take the view that Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 are to be interpreted as meaning that, where an appeal against a transfer decision has suspensive effect, the six-month period during which that transfer must take place begins to run only as from the time of the decision on the merits of the appeal and not as from the time of the decision ordering that the transfer be suspended.

30 According to those governments and the Commission, it is clear from the *travaux préparatoires* for Regulation No 343/2003 that the Community legislature intended to establish a scheme under which transfers would not be carried out until a decision had been given on the merits of the appeal. Otherwise, the competent courts and authorities would be bound by a maximum time-limit for ruling on appeals relating to transfer decisions, a matter which the Community legislature may not regulate. Moreover, the assessment of individual situations under that regulation calls for complex examinations and assessments which are difficult to complete within six months.

31 A number of the governments add that, from a practical point of view, requiring national courts to rule within six months would encourage asylum seekers to abuse the appeals process because, in the Member States where those courts are overburdened with cases, the time-limit would frequently be exceeded, with the result that the requesting Member State would automatically become the Member State responsible for the asylum application.

Reply of the Court

32 Under Article 20(1)(d) of Regulation No 343/2003, the transfer of an asylum seeker to the Member State which is required to take him back is to be carried out as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is suspensive effect. Under Article 20(2), where the transfer does not take place within the six-month time-limit, responsibility is to lie with the Member State in which the application for asylum was lodged.

33 It is not evident from the actual wording of those provisions whether the period for implementation of the transfer begins to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, or only as from the time of the judicial decision ruling on the merits of that procedure.

34 It must be borne in mind however that, according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objective pursued by the rules of which it is part (see, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21, and Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15).

35 Under Article 20(1)(d) of Regulation No 343/2003, read together with Article 20(1)(c), three events are liable to trigger the six-month period allowed to the requesting Member State within which to carry out the transfer of the asylum seeker, depending on the circumstances: (i) the decision of the requested Member State to agree to take the asylum seeker back; (ii) the expiry of the one-month period where the requested Member State does not communicate its decision on the requesting Member State's request to take the asylum seeker back; and (iii) the appeal or review decision where it has suspensive effect in the requesting Member State.

36 Those three events must be examined according to whether the legislation of the requesting Member State makes provision for appeals to have suspensive effect, having regard to the objective underlying the time-limit for implementation of the transfer provided for in Regulation No 343/2003.

37 In that regard a distinction must be drawn between two situations.

38 In the first situation, it follows from the wording of Article 20(1)(d) of Regulation No 343/2003 that, where there is no provision for an appeal to have suspensive effect, the period for implementation of the transfer starts to run as from the time of the decision, explicit or presumed, by which the requested Member State agrees to take back the person concerned, irrespective of the uncertainties surrounding the appeal against the decision ordering his transfer which the asylum seeker may have lodged before the courts of the requesting Member State.

39 In that case only the practical details of the implementation of the transfer remain to be determined, including setting the date thereof.

40 It is in that context that Article 20(1)(d) of Regulation No 343/2003 allows the requesting Member State six months in which to carry out the transfer. Thus, in view of the practical complexities and organisational difficulties associated with implementing the transfer, the purpose of that period is to allow the two Member States concerned to collaborate with a view to carrying out the transfer and, in particular, the requesting Member State to determine the practical details for implementing the transfer, which is carried out in accordance with that State's legislation.

41 It is, moreover, evident from the explanatory memorandum annexed to the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, presented by the Commission on 26 July 2001 (COM(2001) 447 final, p. 5 and pp. 19-20) that it was precisely in order to take account of the practical difficulties encountered by the Member States in carrying out transfers that the Commission proposed extending the period during which the transfer is to be carried out. That period, set at one month in the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ 1997 C 254, p. 1), which was replaced by Regulation No 343/2003, was subsequently increased to six months in Article 20(1)(d) of that regulation, in accordance with that regulation proposal.

42 In the second situation, where the requesting Member State provides for an appeal which may have suspensive effect and the court of that Member State gives its decision such effect, Article 20(1)(d) of Regulation No 343/2003 provides that the period for transfer starts to run as from the time of the 'decision on an appeal or review'.

43 In that second situation, although the point in time where the period for transfer starts to run is different from that laid down for the first situation referred to above, the fact remains that each of the two Member States concerned is confronted with the same practical difficulties in organising the transfer and should thus have the same six-month period in which to carry out that transfer. There is in fact nothing in the wording of Article 20(1)(d) of Regulation No 343/2003 to suggest that the Community legislature intended to treat those two situations differently.

44 It follows that, in the second situation, in the light of the objective pursued by setting a period for the Member States, the start of that period should be determined in such a manner as to allow the Member States, as in the first situation, a six-month period which they are deemed to require in full in order to determine the practical details for carrying out the transfer.

45 Accordingly, the period for carrying out the transfer may begin to run only as from the time the future implementation of the transfer is, in principle, agreed upon and certain, and only the practical details remain to be determined. Such implementation cannot be regarded as being certain, however, if a court of the requesting Member State which is hearing an appeal has not yet ruled on the merits of the appeal but has merely ruled on an application for suspension of the operation of the contested decision.

46 It follows that, in the second situation referred to above, in order to ensure the effectiveness of Article 20(1)(d) of Regulation No 343/2003 laying down the period for implementation of the transfer, that period must begin to run not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

47 This finding is supported by two other sets of considerations, the first concerning observance of the judicial protection guaranteed by a Member State, the second concerning observance of the principle of procedural autonomy of the Member States.

48 In the first place, it is clear that the Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum seekers duly to challenge decisions taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications.

49 Those Member States which wished to introduce appeal remedies liable to lead to decisions having suspensive effect in the context of transfer procedures may not, for the sake of meeting the requirement of expedition, be placed in a less favourable situation than those Member States which did not deem it necessary to do so.

50 Thus, a Member State which, in the context of transfer procedures, has decided to introduce various appeal remedies, including ones having suspensive effect, and for that reason had the time available to it to proceed with deportation of the asylum seeker reduced by the amount of time necessary for the domestic courts to rule on the merits of the case, would be placed in an awkward position, since, if it is unable to organise the transfer of the asylum seeker within the very brief period between the judicial decision on the merits of the case and the expiry of the time-limit for implementation of the transfer, it runs the risk, pursuant to Article 20(2) of Regulation No 343/2003 – under which the acceptance of its responsibility by the requested Member States lapses once the time-limit for implementation of the transfer has expired – of becoming definitively the Member State responsible for processing the asylum application.

51 It follows that an interpretation of Article 20(1)(d) of Regulation No 343/2003, laying down the starting point for calculating the period granted to the requesting Member State for proceeding with the transfer of an asylum applicant, cannot lead to a finding that, for the sake of observing Community law, the requesting State must disregard the suspensive effect of a provisional judicial decision taken in the context of an appeal capable of having such effect, which it nevertheless wished to introduce into its domestic law.

52 Regarding, secondly, observance of the principle of procedural autonomy of the Member States, the Court notes that, if the interpretation of Article 20(1)(d) of Regulation No 343/2003 to the effect that the period for implementation of the transfer begins to run as from the time of the provisional decision having suspensive effect were to prevail, a national court wishing to reconcile compliance with the time-limit with compliance with a provisional judicial decision having suspensive effect would be placed in the position of having to rule on the merits of the transfer procedure before expiry of that time-limit by a decision which may, owing to lack of sufficient time granted to the courts, have been unable to take satisfactory account of the complex nature of the proceedings. As rightly pointed out by some of the governments and the Commission in their observations submitted to the Court, such an interpretation would run counter to that principle, as upheld in the case-law of the Community Courts (see, to that effect, Case C-13/01 *Safalero* ?2003? ECR I-8679, paragraph 49, and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39).

53 In the light of the foregoing considerations, the answer to the question referred is that Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 20(1)(d) and Article 20(2) of Regulation No 343/2003 of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

c) CJEU C-411/10 and C-493/10, N.S. et al., 21 December 2011

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 (*)

(European Union law – Principles – Fundamental rights – Implementation of European Union law – Prohibition of inhuman or degrading treatment – Common European Asylum System – Regulation (EC) No 343/2003 – Concept of 'safe countries' – Transfer of an asylum seeker to the Member State responsible – Obligation – Rebuttable presumption of compliance, by that Member State, with fundamental rights)

In Joined Cases C-411/10 and C-493/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of 12 July and 11 October 2010, lodged at the Court on 18 August and 15 October 2010 respectively, in the proceedings

N. S. (C-411/10)

v

Secretary of State for the Home Department

and

M. E. (C-493/10),

A. S. M.,

M. T.,

K. P.,

E. H.

v

Refugee Applications Commissioner,

Minister for Justice, Equality and Law Reform,

intervening parties:

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (C-411/10),

United Nations High Commissioner for Refugees (UNHCR) (UK) (C-411/10),

Equality and Human Rights Commission (EHRC) (C-411/10),

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (C-493/10),

United Nations High Commissioner for Refugees (UNHCR) (IRL) (C-493/10),

THE COURT (Grand Chamber),

gives the following

Judgment

1 The two references for preliminary rulings concern the interpretation, first, of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and, third, Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; 'Protocol (No 30)').

2 The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

Legal context

International law

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), entered into force on 22 April 1954. It was extended by the Protocol relating to the Status of Refugees of 31 January 1967 ('the 1967 Protocol'), which entered into force on 4 October 1967.

4 All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol, as are the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol, but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol.

5 Article 33(1) of the Geneva Convention, headed 'Prohibition of expulsion or return ("refoulement")', provides:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The Common European Asylum System

6 In order to achieve the objective, laid down by the European Council meeting in Strasbourg on 8 and 9 December 1989, of the harmonisation of their asylum policies, the Member States signed in Dublin, on 15 June 1990, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ 1997 C 254, p. 1; 'the Dublin Convention'). The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.

7 The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 envisaged, inter alia, the establishment of a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say, maintaining the principle of non-refoulement.

8 The Amsterdam Treaty of 2 October 1997 introduced Article 63 into the EC Treaty, which conferred competence on the European Community to adopt the measures recommended by the European Council in Tampere. That treaty also annexed to the EC Treaty the Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305), according to which those States are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters.

9 The adoption of Article 63 EC made it possible, inter alia, to replace between the Member States, with the exception of the Kingdom of Denmark, the Dublin Convention by Regulation No

343/2003, which entered into force on 17 March 2003. It is also on that legal basis that the directives applicable to the cases in the main proceedings were adopted, for the purpose of establishing the Common European Asylum System foreseen by the conclusions of the Tampere European Council.

10 Since entry into force of the Lisbon Treaty, the relevant provisions in asylum matters are Article 78 TFEU, which provides for the establishment of a Common European Asylum System, and Article 80 TFEU, which reiterates the principle of solidarity and fair sharing of responsibility between the Member States.

11 The European Union legislation of relevance to the present cases includes:

(1) Regulation No 343/2003;

(2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

(3) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

(4) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

12 It is also appropriate to mention Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12). As is apparent from recital 20 in the preamble to that directive, one of its objectives is to provide for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

13 The recording of the fingerprint data of foreign nationals illegally crossing an external border of the European Union makes it possible to determine the Member State responsible for an asylum application. Such recording is provided for by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

14 Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. They also refer, in their second recitals, to the conclusions of the Tampere European Council.

15 Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

16 Article 1 of Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

17 Article 3(1) and (2) of that regulation provide:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the

Member State responsible or the Member State which has been requested to take charge of or take back the applicant.'

18 In order to determine which is 'the Member State responsible' for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

19 Article 13 of that regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining the asylum application.

20 According to Article 17 of Regulation No 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible, call upon the other Member State to take charge of the applicant.

21 Article 18(7) of that regulation provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.

22 Article 19 of Regulation No 343/2003 is worded as follows:

'1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis if national legislation allows for this.

…

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

…'

23 The United Kingdom participates in the application of each of the regulations and the four directives mentioned in paragraphs 11 to 13 of the present judgment. Ireland, by contrast, participates in the application of the regulations and of Directives 2004/83, 2005/85 and 2001/55, but not Directive 2003/9.

24 The Kingdom of Denmark is bound by the Agreement which it concluded with the European Community extending to Denmark the provisions of Council Regulation (EC) No 2725/2000, approved by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p. 37). It is not bound by the directives referred to in paragraph 11 of the present judgment.

25 The European Community has also concluded an Agreement with the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

26 The European Community has similarly concluded an Agreement with the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3), and the Protocol with the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6).

27 Directive 2003/9 lays down minimum standards for the reception of asylum seekers in Member States. Those standards concern in particular the obligations concerning the information

and documents which must be provided to asylum seekers, the decisions which may be adopted by the Member States concerning residence and freedom of movement of asylum seekers within their territory, families, medical screening, schooling and education of minors, employment of asylum seekers and their access to vocational training, the general rules on material reception conditions and health care available to asylum applicants, the modalities for material reception conditions and the health care which must be granted to asylum applicants.

28 Directive 2003/9 also provides for an obligation to control the level of reception conditions and the possibility of appealing with regard to the matters and decisions covered by it. In addition, it contains rules concerning the training of the authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.

29 Directive 2004/83 lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Chapter II thereof contains several provisions explaining how to assess applications. Chapter III thereof lays down the conditions which must be satisfied in order to qualify for being a refugee. Chapter IV concerns refugee status. Chapters V and VI concern the conditions which must be satisfied in order to qualify for subsidiary protection and the status conferred thereby. Chapter VII contains various rules setting out the content of international protection. According to Article 20(1) of Directive 2004/83, that chapter is to be without prejudice to the rights laid down in the Geneva Convention.

30 Directive 2005/85 lays down the rights of asylum seekers and the procedures for examining applications.

31 Article 36(1) of Directive 2005/85, under the heading 'The European safe third countries concept' states:

'Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.'

32 The conditions laid down in Article 36(2) include:

– ratification of and compliance with the provisions of the Geneva Convention;

– the existence of an asylum procedure prescribed by law;

– ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

33 Article 39 of Directive 2005/85 sets out the effective remedies that it must be possible to pursue before the courts of the Member States. Article 39(1)(a)(iii) refers to decisions not to conduct an examination pursuant to Article 36 of the directive.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-411/10

34 N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an asylum application.

35 According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months. He states that he escaped from his place of detention in Turkey and travelled from that State to the United Kingdom, where he arrived on 12 January 2009 and where, that same day, he lodged an asylum application.

36 On 1 April 2009, the Secretary of State for the Home Department ('the Secretary of State') made a request to the Hellenic Republic, pursuant to Article 17 of Regulation No 343/2003, to take charge of the appellant in the main proceedings in order to examine his asylum application. The Hellenic Republic failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant's claim.

37 On 30 July 2009, the Secretary of State notified the appellant in the main proceedings that directions had been given for his removal to Greece on 6 August 2009.

38 On 31 July 2009, the Secretary of State notified the appellant in the main proceedings of a decision certifying that, under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Asylum Act'), his claim that his

removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 Asylum Act.

39 The consequence of that certification decision was, in accordance with paragraph 5(4) of Part 2 of Schedule 3 to the 2004 Asylum Act, that the appellant in the main proceedings did not have a right to lodge an immigration appeal in the United Kingdom, with suspensive effect, against the decision ordering his transfer to Greece, an appeal to which he would have been entitled in the absence of such a certification decision.

40 On 31 July 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, on the ground that there was a risk that his fundamental rights under European Union law, the ECHR and/or the Geneva Convention would be breached if he were returned to Greece. By letter of 4 August 2009, the Secretary of State maintained his decision to transfer the appellant in the main proceedings to Greece and his decision certifying that the claim of the appellant in the main proceedings based on the ECHR was clearly unfounded.

41 On 6 August 2009, the appellant in the main proceedings issued proceedings seeking judicial review of the Secretary of State's decisions. As a result, the Secretary of State annulled the directions for his transfer. On 14 October 2009, the permission sought by the appellant for judicial review was granted.

42 The application was examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) from 24 to 26 February 2010. By judgment of 31 March 2010, Mr Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

43 The appellant in the main proceedings appealed to that court on 21 April 2010.

44 It emerges from the order for reference, in which the Court of Appeal refers to the judgment of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), that:

(1) asylum procedures in Greece are said to have serious shortcomings: applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care;

(2) the proportion of asylum applications which are granted is understood to be extremely low;

(3) judicial remedies are stated to be inadequate and very difficult to access;

(4) the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food.

45 The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) considered that the risks of refoulement from Greece to Afghanistan and Turkey were not established in the case of persons returned under Regulation No 343/2003, but that view is contested by the appellant in the main proceedings before the referring court.

46 Before the Court of Appeal (England & Wales) (Civil Division), the Secretary of State accepted that 'the fundamental rights set out in the Charter can be relied on as against the United Kingdom and … that the Administrative Court erred in holding otherwise'. According to the Secretary of State, the Charter simply restates rights which already form an integral part of European Union law and does not create any new rights. However, the Secretary of State contended that the High Court of Justice (England & Wales) Queen's Bench Division (Administrative Court) was wrong to find that she was bound to take into account European Union fundamental rights when exercising her discretion under Article 3(2) of the Regulation. According to the Secretary of State, that discretionary power does not fall within the scope of European Union law.

47 In the alternative, the Secretary of State contended that the obligation to observe European Union fundamental rights does not require her to take into account the evidence that, if the appellant were returned to Greece, there would be a substantial risk that his fundamental rights under European Union law would be infringed. She maintained that the scheme of Regulation No 343/2003 entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law.

48 Finally, the appellant in the main proceedings contended before the referring court that the protection conferred by the Charter is higher than and goes beyond that guaranteed by, inter alia, Article 3 of the ECHR, which might lead to a different outcome in the present case.

49 At the hearing of 12 July 2010, the referring court decided that decisions on certain questions of European Union law were necessary for it to give judgment on the appeal.

50 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a decision made by a Member State under Article 3(2) of … Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter …?

If Question 1 is answered in the affirmative:

(2) Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation ("the responsible State"), regardless of the situation in the responsible State?

(3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under European Union law; and/ or (ii) the minimum standards imposed by Directives 2003/9 …, 2004/83 … and 2005/85 …?

(4) Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?

(5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the ECHR?

(6) Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation [No 343/2003], to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?

(7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?'

Case C-493/10

51 This case concerns five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, whilst the other two admitted they had previously been in Greece. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there.

52 Each of the appellants in the main proceedings resists return to Greece. As is apparent from the order for reference, it has not been argued that the transfer of the appellants to Greece under Regulation No 343/2003 would violate Article 3 ECHR because of a risk of refoulement, chain refoulement, ill treatment or suspension of asylum claims. It is also not alleged that the transfer would breach another article of the ECHR. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

53 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the transferring Member State under … Regulation (EC) No 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter …, … Directives 2003/9/EC, 2004/83/EC and 2005/85/EC and Regulation (EC) No 343/2003?

(2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member Sate obliged to accept responsibility for examining the application under Article 3(2) of … Regulation (EC) No 343/2003?'

54 Cases C-411/10 and C-493/10 were, by order of the President of the Court of 16 May 2011, joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-411/10

55 By its first question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

Observations submitted to the Court

56 N.S., the Equality and Human Rights Commission (EHRC), Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK), the United Nations High Commissioner for Refugees (UNHCR), the French, Netherlands, Austrian and Finnish Governments and the European Commission consider that a decision adopted on the basis of Article 3(2) of Regulation No 343/2003 falls within the scope of European Union law.

57 N.S. points out, in that regard, that the exercise of the power provided for by that provision will not necessarily be more favourable to the applicant, which explains why, in its assessment of the Dublin system (COM (2007) 299 final), the Commission proposed that exercise of the power provided for by Article 3(2) of Regulation No 343/2003 should be subject to the consent of the asylum seeker.

58 According to Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) and the French Government, in particular, the possibility provided for in Article 3(2) of Regulation No 343/2003 is justified by the fact that the purpose of the Regulation is to protect fundamental rights and that it might be necessary to exercise the power provided for by that article.

59 The Finnish Government emphasises that Regulation No 343/2003 forms part of a set of rules establishing a system.

60 According to the Commission, when a regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-0000). It points out that a decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 has consequences for that Member State, which will be bound by the procedural obligations of the European Union and by the directives.

61 Ireland, the United Kingdom, the Belgian Government and the Italian Government, on the other hand, consider that such a decision under Article 3(2) of the Regulation does not fall within the scope of European Union law. The arguments put forward are the clarity of the text, which provides for an option, the reference to a 'sovereignty' clause or 'discretionary clause' in the Commission documents, the raison d'être of such a clause, that is humanitarian grounds, and, lastly, the logic of the system established by Regulation No 343/2003.

62 The United Kingdom emphasises that a sovereignty clause is not a derogation within the meaning of Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43. It also points out that the fact that the exercise of that clause does not implement European Union law does not mean that Member States are disregarding fundamental rights, since they are bound by the Geneva Convention and the ECHR. The Belgian Government, however, submits that carrying out the decision to transfer the asylum seeker implements Regulation No 343/2003 and therefore falls within the scope of Article 6 TEU and the Charter.

63 The Czech Government takes the view that the decision by a Member State falls within European Union law when that State exercises the sovereignty clause, but not when it does not exercise that power.

The Court's reply

64 Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.

65 Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature.

66 As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences

provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

69 The answer to the first question in Case C-411/10 is therefore that the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

The second to fourth questions and the sixth question in Case C-411/10 and the two questions in Case C-493/10

70 By the second question in Case C-411/10 and the first question in Case C-493/10, the referring courts ask, in essence, whether the Member State which should transfer the asylum seeker to the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union, Directives 2003/9, 2004/83 and 2005/85 and with Regulation No 343/2003.

71 By the third question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the obligation on the Member State which should transfer the asylum seeker to observe fundamental rights precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by the abovementioned directives.

72 By the fourth question in Case C-411/10 and the second question in Case C-493/10, the referring courts ask, in essence, whether, where the Member State responsible is found not to be in compliance with fundamental rights, the Member State which should transfer the asylum seeker is obliged to accept responsibility for examining the asylum application under Article 3(2) of Council Regulation (EC) No 343/2003?

73 Finally, by its sixth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether a provision of national law which requires a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation No 343/2003, to treat that Member State as a 'safe country' is compatible with the rights set out in Article 47 of the Charter.

74 Those questions should be considered together.

75 The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).

76 As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.

77 According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

78 Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

79 It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to

26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.

80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

81 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

82 Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

83 At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

84 In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish, as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

85 If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

86 By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

87 With regard to the situation in Greece, the parties who have submitted observations to the Court are in agreement that that Member State was, in 2010, the point of entry in the European Union of almost 90% of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice. The Hellenic Republic stated that the Member States had not agreed to the Commission's proposal that the application of Regulation No 343/2003 be suspended and that it be amended by mitigating the criterion of first entry.

88 In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S.* v. *Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*).

89 The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.

90 In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350).

91 Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

92 The relevance of the reports and proposals for amendment of Regulation No 343/2003 emanating from the Commission should be noted – these must be known to the Member State which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.

93 In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons.

94 It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

95 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State identified as 'responsible' in accordance with Regulation No 343/2003 is obliged to examine the application itself, it should be recalled that Chapter III of that Regulation refers to a number of criteria and that, in accordance with Article 5(1) of that regulation, those criteria apply in the order in which they are set out in that chapter.

96 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

97 In accordance with Article 13 of Regulation No 343/2003, where the Member State responsible for examining the application for asylum cannot be designated on the basis of the criteria listed in that Regulation, the first Member State with which the application for asylum was lodged is to be responsible for examining it.

98 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

99 It follows from all of the foregoing considerations that, as stated by the Advocate General in paragraph 131 of her Opinion, an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.

100 In addition, as stated by N.S., were Regulation No 343/2003 to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.

101 That would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.

102 In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

103 Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.

104 In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.

105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

107 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

108 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The fifth question in Case C-411/10

109 By its fifth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR.

110 According to the Commission, the answer to that question must make it possible to identify the provisions of the Charter the infringement of which by the Member State responsible would result in the secondary responsibility of the Member State which has to decide on the transfer.

111 Even if the Court of Appeal (England & Wales) (Civil Division) did not expressly provide reasons, in the order for reference, why it required an answer to the question in order to give judgment, a reading of that decision in fact suggests that that question can be accounted for by the decision of 2 December 2008 in *K.R.S.* v. *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, in which the European Court of Human Rights held inadmissible an application claiming that Article 3 and 13 of the ECHR would be infringed were the applicant to be transferred by the United Kingdom to Greece. Before the Court of Appeal (England & Wales) (Civil Division), a number of parties claimed that the protection of fundamental rights stemming from the Charter is wider than that conferred by the ECHR and that, taking the Charter into account, their request not to transfer the applicant in the main proceedings to Greece would have to be granted.

112 After the order for reference was made, the European Court of Human Rights reviewed its position in the light of new evidence and held, in *M.S.S.* v *Belgium and Greece*, not only that the Hellenic Republic had infringed Article 3 of the ECHR owing to the applicant's detention and living conditions in Greece and also Article 13 of the ECHR read in conjunction with the aforesaid Article 3 on account of the deficiencies in the asylum procedure conducted in the applicant's case, but also that the Kingdom of Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece which did not comply with that article.

113 As follows from paragraph 106 above, a Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 in the circumstances described in paragraph 94 of the present judgment.

114 Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

115 Consequently, the answer to the fifth question in Case C-411/10 is that Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

The seventh question in Case C-411/10

116 By its seventh question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions should be qualified in any respect so as to take account of Protocol (No 30).

117 As noted by the EHRC, that question arises because of the position taken by the Secretary of State before the High Court of Justice (England & Wales) (Administrative Court) that the provisions of the Charter do not apply in the United Kingdom.

118 Even if the Secretary of State no longer maintained that position before the Court of Appeal (England & Wales) (Civil Division), it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.

119 According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.

121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

122 The answer to the seventh question in Case C-411/10 is therefore that, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30).

Costs

123 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The decision adopted by a Member State on the basis of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, whether to**

examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

2. **European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.**

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3. **Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.**

4. **In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.**

2. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

3. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

a) ECJ C-465/07, Elgafaji, 17 February 2009

JUDGMENT OF THE COURT (Grand Chamber)

17 February 2009 (*)

(Directive 2004/83/EC – Minimum standards for determining who qualifies for refugee status or for subsidiary protection status – Person eligible for subsidiary protection – Article 2(e) – Real risk of suffering serious harm – Article 15(c) – Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict – Proof)

In Case C-465/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Raad van State (Netherlands), made by decision of 12 October 2007, received at the Court on 17 October 2007, in the proceedings

Meki Elgafaji,

Noor Elgafaji

v

Staatssecretaris van Justitie,

THE COURT (Grand Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'the Directive'), in conjunction with Article 2(e) of that directive.

2 The reference was made in the course of proceedings between Mr and Mrs Elgafaji, both Iraqi nationals, and the Staatssecretaris van Justitie (State Secretary for Justice) relating to his refusal of their applications for temporary residence permits in the Netherlands.

Legal context

The European Convention for the Protection of Human Rights and Fundamental Freedoms

3 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), is entitled 'Prohibition of torture', and provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Community legislation

4 Recital 1 in the preamble to the Directive states:

'A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.'

5 Recital 6 in the preamble to the Directive states:

'The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'

6 Recital 10 in the preamble to the Directive states:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

7 Recitals 24 to 26 in the preamble to the Directive state:

'(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the [Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951].

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.'

8 Article 1 of the Directive provides:

'The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.'

9 Under Article 2(c), (e) and (g) of the Directive:

'…

(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country …

…

(e) "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 … and [who] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

…

(g) "application for international protection" means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status …'

10 Under Article 4(1), (3) and (4) in Chapter II of the Directive, entitled 'Assessment of applications for international protection':

– Member States may consider it the duty of the applicant to submit all elements needed to substantiate the application for international protection;

– the assessment of an application for international protection is to be carried out on an individual basis taking into account a number of factors as they relate to the country of origin at the time of taking a decision on the application and the personal circumstances of the applicant;

– the fact that an applicant has already been subject to serious harm or to direct threats of such harm, is a serious indication of a real risk of suffering serious harm, unless there are good reasons to consider that such serious harm will not be repeated.

11 Article 8(1) in Chapter II, provides:

'As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.'

12 Under the heading 'Serious harm', Article 15 in Chapter V of the Directive, entitled 'Qualification for subsidiary protection', provides:

'Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

13 Article 18 of the Directive provides that Member States are to grant subsidiary protection status to a third country national eligible for subsidiary protection in accordance with Chapters II and V of that directive.

National legislation

14 Article 29(1)(b) and (d) of the Law on Aliens 2000 (Vreemdelingenwet 2000, 'the Vw 2000') provides:

'A temporary residence permit, as referred to in Article 28, may be issued to an alien:

…

(b) who has proved that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment;

…

(d) for whom return to his country of origin would, in the opinion of the Minister, constitute an exceptional hardship in the context of the overall situation there.'

15 The Circular on Aliens of 2000 (Vreemdelingencirculaire 2000), in the version in force on 20 December 2006, states in paragraph C 1/4.3.1:

'Article 29(1)(b) of the [Vw 2000] allows the grant of a residence permit where the alien has proved satisfactorily that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

That provision is derived from Article 3 of [the ECHR]. The removal of a person to a country in which he runs a real risk of being subjected to such treatment constitutes an infringement of that article. If that real risk has been or is established, a temporary (asylum) residence permit is in principle issued.

…'

16 A new Article 3.105(d) was inserted into the Decree on Aliens of 2000 (Vreemdelingenbesluit 2000) in order expressly to transpose, with effect from 25 April 2008, Article 15(c) of the Directive.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 13 December 2006 Mr and Mrs Elgafaji submitted applications for temporary residence permits in the Netherlands, together with evidence seeking to prove the real risk to which they would be exposed if they were expelled to their country of origin, in this case, Iraq. In support of their arguments, they relied, in particular, on facts relating to their personal circumstances.

18 They pointed out, inter alia, that Mr Elgafaji, who is a Shiite Muslim, had worked from August 2004 until September 2006 for a British firm providing security for personnel transport between the airport and the 'green' zone. They stated that Mr Elgafaji's uncle, employed by the same firm, had been killed by militia, his death certificate stating that his death followed a terrorist act. A short time later, a letter threatening 'death to collaborators' was fixed to the door of the residence which Mr Elgafaji shared with his wife, a Sunni Muslim.

19 By orders of 20 December 2006, the Minister voor Vreemdelingenzaken en Integratie (Minister for Immigration and Integration; 'the Minister') – the competent authority until 22 February 2007, the date on which the Staatssecretaris van Justitie became responsible for immigration matters – refused to grant temporary residence permits to Mr and Mrs Elgafaji. He found, inter alia, that they had not proved satisfactorily the circumstances on which they were relying and, therefore, had not established the real risk of serious and individual threat to which they claimed to be exposed in their country of origin. He thus concluded that their situation did not come within the scope of Article 29(1)(b) of the Vw 2000.

20 According to the Minister, the standard of proof required for the protection granted under Article 15(b) of the Directive is identical to that required for the protection granted under Article 15(c). Those two provisions, like Article 29(1)(b) of the Vw 2000, require applicants to show satisfactorily, in their individual circumstances, the risk of serious and individual threat to which they would be exposed were they to be returned to their country of origin. As Mr and Mrs Elgafaji failed to produce such evidence under Article 29(1)(b) of the Vw 2000, they could not effectively rely on Article 15(c) of the Directive.

21 Following the refusal of their applications for temporary residence permits, Mr and Mrs Elgafaji brought actions before the Rechtbank te's-Gravenhage (District Court, The Hague). Their actions before that court were successful.

22 That court held, inter alia, that Article 15(c) of the Directive, which takes account of the existence of armed conflict in the country of origin of the applicant seeking protection, does not require the high degree of individualisation of the threat required by Article 15(b) of the Directive and by Article 29(1)(b) of the Vw 2000. Thus, the existence of a serious and individual threat to the persons seeking protection can be proved more easily under Article 15(c) of the Directive than under Article 15(b).

23 Consequently, the Rechtbank te 's-Gravenhage annulled the orders of 20 December 2006 refusing to grant temporary residence permits to Mr and Mrs Elgafaji, since the proof required under Article 15(c) of the Directive had been aligned with that required in the application of Article 15(b) of the Directive, as reproduced in Article 29(1)(b) of the Vw 2000.

24 According to that court, the Minister ought to have examined whether there were grounds for issuing temporary residence permits to Mr and Mrs Elgafaji under Article 29(1)(d) of the Vw 2000 on account of the existence of serious harm within the meaning of Article 15(c) of the Directive.

25 Seised on appeal, the Raad van State (Council of State) held that there were difficulties in interpreting the relevant provisions of the Directive. It held, furthermore, that Article 15(c) of the Directive had not been transposed into Netherlands law by 20 December 2006, the date on which the Minister's contested orders were made.

26 In those circumstances, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?

(2) If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?'

The questions referred for a preliminary ruling

27 At the outset, it should be noted that the referring court seeks guidance on the protection guaranteed under Article 15(c) of the Directive, in comparison with that under Article 3 of the ECHR as interpreted in the case-law of the European Court of Human Rights (see, inter alia, Eur. Court H.R. *N.A.v.theUnited Kingdom*, judgment of 17 July 2008, not yet published in the *Reports of Judgments and Decisions*, § 115 to 117, and the case-law cited).

28 In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.

29 The questions referred, which it is appropriate to examine together, thus concern the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof.

30 Having regard to those preliminary observations, and in the light of the circumstances of the case in the main proceedings, the referring court asks, in essence, whether Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances. If not, the referring court wishes to know the criterion on the basis of which the existence of such a threat can be considered to be established.

31 In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.

32 In that regard, it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.

33 By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.

34 Reference is made, more generally, to a 'threat … to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.

35 In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed

conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.

36 That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.

37 While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word'normally' – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.

38 The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.

39 In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

40 Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

– the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and

– the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

41 Lastly, in the case in the main proceedings, it should be borne in mind that, although Article 15(c) of the Directive was expressly transposed into Netherlands law only after the facts giving rise to the dispute before the referring court, it is for that court to seek to carry out an interpretation of national law, in particular of Article 29(1)(b) and (d) of the Vw 2000, which is consistent with the Directive.

42 According to settled case-law, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see, inter alia, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-188/07 *Commune de Mesquer* [2008] ECR I-0000, paragraph 84).

43 Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

– the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

– the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

44 It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, *N.A. v.the United Kingdom*, § 115 to 117 and the case-law cited).

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

– **the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;**

– **the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.**

b) CJEU C-175/08, C-176/08, C-178/08 and C-179/08, Abdulla et al., 2 March 2010

JUDGMENT OF THE COURT (Grand Chamber)

2 March 2010 (*)

(Directive 2004/83/EC – Minimum standards for determining who qualifies for refugee status or for subsidiary protection status – Classification as a 'refugee' – Article 2(c) – Cessation of refugee status – Article 11 – Change of circumstances – Article 11(1)(e) – Refugee – Unfounded fear of persecution – Assessment – Article 11(2) – Revocation of refugee status – Proof – Article 14(2))

In Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08,

REFERENCES for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesverwaltungsgericht (Germany), made by decisions of 7 February and 31 March 2008, received at the Court on 29 April 2008, in the proceedings

Aydin Salahadin Abdulla (C-175/08),

Kamil Hasan (C-176/08),

Ahmed Adem,

Hamrin Mosa Rashi (C-178/08),

Dler Jamal (C-179/08)

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) ('the Directive'), read in conjunction with Article 2(c) of that directive.

2 The references have been made in the course of proceedings between the Iraqi nationals Mr Salahadin Abdulla, Mr Hasan, Mr Adem and his wife, Ms Mosa Rashi, and Mr Jamal (collectively, 'the appellants in the main proceedings') and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesministerium des Innern (Federal Ministry of the Interior), itself represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ('the Bundesamt'), regarding the latter's revocation of their refugee status.

Legal context

The Convention relating to the Status of Refugees

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

4 The first subparagraph of Article 1(A)(2) of the Geneva Convention provides that the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

5 Article 1(C)(5) of the Geneva Convention provides that:

'This Convention shall cease to apply to any person falling under the terms of section A if:

…

5. He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.'

European Union legislation

6 The first subparagraph of Article 6(1) TEU provides:

'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

7 Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter') states:

'The right to asylum shall be guaranteed with due respect for the rules of the [Geneva Convention] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.'

8 Recitals 2 and 3 of the preamble to the Directive state:

'(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention …, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention … [provides] the cornerstone of the international legal regime for the protection of refugees.'

9 Recital 10 of the preamble to the Directive states:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

10 Recitals 16 and 17 of the preamble to the Directive are worded as follows:

‘(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.’

11 Article 1 of the Directive provides:

‘The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.’

12 Under Article 2(a), (c) to (e) and (g) of the Directive:

‘(a) “international protection” means the refugee and subsidiary protection status as defined in (d) and (f);

…

(c) “refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) “refugee status” means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) “person eligible for subsidiary protection” means a third country national … who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin …, would face a real risk of suffering serious harm as defined in Article 15 … and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

…

(g) “application for international protection” means a request made by a third country national … for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status …’

13 Articles 13 and 18 of the Directive state that Member States are to grant refugee status or subsidiary protection status to third country nationals who satisfy the conditions laid down respectively in Chapters II and III or II and V of that directive.

14 Article 4 of the Directive, which is contained in Chapter II thereof (‘Assessment of applications for international protection’), sets out the conditions governing the assessment of facts and circumstances. Article 4(1) provides:

‘Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.’

15 Article 4(3) of the Directive specifies the matters to be taken into account for the purpose of assessing an application for international protection on an individual basis.

16 Under Article 4(4) of the Directive, ‘[t]he fact that an applicant has already been subject to persecution … or to direct threats of such persecution … is a serious indication of the applicant’s well-founded fear of persecution …, unless there are good reasons to consider that such persecution … will not be repeated’.

17 Article 5(1) of the Directive, which also features in Chapter II thereof, adds that a well-founded fear of being persecuted may be based on events which have taken place since the applicant left the country of origin.

18 Article 6 of the Directive, which is contained in Chapter II and is entitled ‘Actors of persecution or serious harm’, states:

‘Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.'

19 Article 7(1) and (2), which is contained in Chapter II and is entitled 'Actors of protection', provides:

'1. Protection can be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.'

20 Article 9(1) and (2) of the Directive, which is contained in Chapter III ('Qualification for being a refugee'), defines acts of persecution. Article 9(3) requires that there be a connection between the reasons for persecution mentioned in Article 10 of the Directive and those acts of persecution.

21 Article 10(1) of the Directive, which is also contained in Chapter III and is entitled 'Reasons for persecution', determines the elements which must be taken into account in the assessment of each of the five reasons for persecution.

22 Article 11 of the Directive, which also features in Chapter III and is entitled 'Cessation', provides:

'1. A third country national … shall cease to be a refugee if he or she:

…

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

…

2. In considering [point] (e) … of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well founded.'

23 Article 14 of the Directive, which is entitled 'Revocation of, ending of or refusal to renew refugee status' and features in Chapter IV ('Refugee status'), provides as follows:

'1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national … granted by a [competent] body, if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State which has granted refugee status shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

…'

24 Article 15 of the Directive, which is entitled 'Serious harm' and features in Chapter V ('Qualification for subsidiary protection'), states:

'Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

25 In accordance with its Articles 38 and 39, the Directive entered into force on 20 October 2004 and had to be transposed by 10 October 2006 at the latest.

National legislation

26 Paragraph 3(1) of the Law on asylum procedure (Asylverfahrensgesetz) ('the AsylVfG') provides that:

'A foreign national is a refugee within the meaning of the [Geneva Convention] when he is exposed to the threats referred to in Paragraph 60(1) of the Law on the residence of foreign nationals [Aufenthaltsgesetz] in his State of nationality …'

27 Paragraph 60 of the Law on the residence of foreign nationals, which is contained in the chapter dealing with cessation of residence and entitled 'Prohibition of deportation', provides in subparagraph (1):

'Under the [Geneva] Convention, a foreign national cannot be deported to a State in which his life or freedom are threatened for reasons of his race, religion, nationality, membership of a particular social group or political opinion …'

28 The first and second sentences of Paragraph 73(1) of the AsylVfG, as amended by the Law implementing the directives of the European Union on rights of residence and asylum (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union) of 19 August 2007 (BGBl. 2007 I, p. 1970), state:

'The grant of the right to asylum and of refugee status shall be revoked without delay when the conditions on which they were based have ceased to exist. This is particularly the case when, the circumstances which led to that right to asylum or refugee status being granted to him having ceased to exist, the foreign national can no longer continue to refuse to avail himself of the protection of his country of nationality …'

29 Pursuant to the third sentence of Paragraph 73(1) of the AsylVfG, the grant of the right to asylum and of refugee status may not be revoked 'when the foreign national is able to invoke compelling reasons, arising out of persecution to which he has been subject in the past, for refusing to avail himself of the protection of his country of nationality …'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

30 The appellants in the main proceedings travelled to Germany between 1999 and 2002 and there applied for asylum.

31 In support of their respective applications, they submitted a variety of reasons which made them fear being persecuted in Iraq by the regime of Saddam Hussein's Baath Party.

32 The Bundesamt granted them refugee status in 2001 and 2002.

33 In 2004 and 2005 the Bundesamt, as a result of the changed circumstances in Iraq, initiated procedures to revoke the recognition as refugees which had been granted to the appellants.

34 As a result of those procedures, the Bundesamt revoked that recognition by decisions adopted between January and August 2005.

35 By decisions delivered between July and October 2005, the competent administrative courts set aside the revocation decisions. They held, in essence, that, given the extremely unstable situation in Iraq, it could not be concluded that there had been a durable and lasting change in the situation such as to justify revocation of the recognition as refugees which had been granted.

36 Following appeals lodged by the Federal Republic of Germany, the higher administrative courts having jurisdiction in the matter, by rulings delivered in March and August 2006, overturned the first-instance decisions and dismissed the actions for annulment which had been brought against the revocation decisions. Referring to the fundamental change in the situation in Iraq, those courts held that the appellants in the main proceedings were now safe from the persecution suffered under the previous regime and that they were not under any significantly likely threat of further persecution on any other grounds.

37 The appellants in the main proceedings lodged appeals on a point of law ('Revision') against the appellate rulings before the Bundesverwaltungsgericht (Federal Administrative Court), seeking confirmation of the decisions delivered at first instance.

38 The referring court takes the view that there is a cessation of refugee status when, first, the situation in a refugee's country of origin has changed in a significant and non-temporary manner and the circumstances justifying his fear of persecution, on the basis of which he was recognised as a refugee, have ceased to exist and when, secondly, he has no other reason to fear being 'persecuted' within the meaning of the Directive.

39 According to the referring court, the expression 'protection of the country' referred to in Article 11(1)(e) of the Directive has the same meaning as the expression 'protection of that country' used in Article 2(c) of the Directive and refers solely to protection against persecution.

40 General dangers do not, in the view of the referring court, come within the scope of the protection of that directive or of the Geneva Convention. The question whether a refugee may be forced to return to his country of origin even though dangers of a general nature exist there cannot be examined in the context of the revocation of refugee status pursuant to Paragraph 73(1) of the AsylVfG. That question may be examined only subsequently, when a decision has to be taken on whether the person concerned must be returned to his country of origin.

41 The referring court maintains that, according to the findings made at the stage of the appeal proceedings by which it is bound, the appellants in the main proceedings cannot rely upon the effects of previous acts of persecution for the purpose of refusing to return to Iraq. It deduces from this that the 'compelling reasons' arising out of previous persecution referred to in the third sentence of Paragraph 73(1) of the AsylVfG and in the second clause of Article 1(C)(5) of the Geneva Convention cannot be relied upon before it.

42 It notes, however, that the revocation of refugee status does not necessarily lead to the loss of a person's right to reside in Germany.

43 In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases in the main proceedings, the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 11(1)(e) of [the] Directive … to be interpreted as meaning that – apart from the second clause of Article 1(C)(5) of the [Geneva] Convention – refugee status ceases to exist if the refugee's well-founded fear of persecution within the terms of Article 2(c) of that directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of [that directive]?

2. If Question 1 is to be answered in the negative: does the cessation of refugee status under Article 11(1)(e) of [the] Directive also require that, in the country of the refugee's nationality,

(a) an actor of protection within the meaning of Article 7(1) of [the Directive] be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,

(b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of [the Directive], which leads to the granting of subsidiary protection under Article 18 of that directive, and/or

(c) the security situation be stable and the general living conditions ensure a minimum standard of living?

3. In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be:

(a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or

(b) assessed having regard to the relaxation of the burden of proof under Article 4(4) of [the] Directive ...?'

44 By order of the President of the Court of 25 June 2008, Cases C-175/08 to C-179/08 were joined for the purposes of the written and oral procedure and of the judgment. By order of the President of the Court of 4 August 2008, Case C-177/08 was subsequently disjoined from those cases and removed from the register of the Court.

Jurisdiction of the Court

45 In the cases in the main proceedings, the appellants filed their applications for international protection before the Directive entered into force, that is to say, before 20 October 2004.

46 In the case where a person has ceased to hold refugee status under Article 11 of the Directive, Article 14(1) thereof provides for revocation of that status only if the application for international protection was filed after that directive had entered into force.

47 The applications for international protection which have given rise to the questions referred by the Bundesverwaltungsgericht are not therefore covered *ratione temporis* by the Directive.

48 However, it must be borne in mind that where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling. Neither the wording of Articles 68 EC and 234 EC nor the aim of the procedure established by Article 234 EC indicates that the framers of the EC Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a directive where the domestic law of a Member State refers to the provisions of that directive in order to determine the rules applicable to a situation which is purely internal to that State. In such a case it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions taken

from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraphs 15 and 16 and the case-law cited).

49 In the present cases, the referring court maintains that the Law transposing the directives on rights of residence and asylum, which entered into force on 28 August 2007 and from which the new wording of Paragraph 73(1) of the AsylVfG stems, transposed Articles 11 and 14 of the Directive without imposing temporal limits on the applicability of its provisions, with the result that those national provisions are applicable to applications for international protection which were filed before the Directive entered into force.

50 In those circumstances, the questions referred for a preliminary ruling should be answered.

The questions referred

Preliminary observations

51 The Directive was adopted on the basis of, inter alia, point (1)(c) of the first paragraph of Article 63 EC, which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees.

52 It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.

53 The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC.

54 Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter.

The first question

55 By its first question, the referring court asks, in essence, whether Article 11(1)(e) of the Directive is to be interpreted as meaning that refugee status ceases to exist if the circumstances which justified the refugee's fear of persecution for one of the reasons referred to in Article 2(c) of the Directive, on the basis of which refugee status was granted, no longer exist and the refugee has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of the Directive.

56 In that regard, it must be borne in mind that, under Article 2(c) of the Directive, the term 'refugee' refers, in particular, to a third country national who is outside the country of his nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, 'owing to such fear', unwilling to avail himself of the 'protection' of that country.

57 The national concerned must therefore, on account of circumstances existing in his country of origin, have a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in the Directive and the Geneva Convention.

58 Those circumstances will indicate that the third country does not protect its national against acts of persecution.

59 Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the 'protection' of his country of origin within the meaning of Article 2(c) of the Directive, that is to say, in terms of that country's ability to prevent or punish acts of persecution.

60 They are therefore determinant factors in respect of the granting of refugee status.

61 Under Article 4(1) of the Directive, the facts and circumstances are to be assessed, for the purposes of the granting of refugee status, in cooperation with the applicant.

62 Under Article 13 of the Directive, the Member State is required to grant refugee status to the applicant if he qualifies under, inter alia, Articles 9 and 10 thereof.

63 Article 9 of the Directive defines the elements which make it possible to regard acts as constituting persecution. In that regard, Article 9(1) states that the relevant facts must be 'sufficiently serious' by their nature or repetition as to constitute a 'severe violation of basic human rights' or be an accumulation of various measures which is 'sufficiently severe' as to affect an individual in a manner similar to a 'severe violation of basic human rights'.

64 Article 9(3) of the Directive adds that there must be a connection between the reasons for persecution mentioned in Article 10 of the Directive and the acts of persecution.

65 Article 11(1)(e) of the Directive, in the same way as Article 1(C)(5) of the Geneva Convention, provides that a person ceases to be classified as a refugee when the circumstances as a result of which he was recognised as such have ceased to exist, that is to say, in other words, when he no longer qualifies for refugee status.

66 By stating that, because those circumstances 'have ceased to exist', the national 'can no longer … continue to refuse to avail himself or herself of the protection of the country of nationality', that article establishes, by its very wording, a causal connection between the change in circumstances and the impossibility for the person concerned to continue to refuse and thus to retain his refugee status, in that his original fear of persecution no longer appears to be well founded.

67 In so far as it provides that the national 'can no longer … continue to refuse' to avail himself of the protection of his country of origin, Article 11(1)(e) of the Directive implies that the 'protection' in question is the same as that which has up to that point been lacking, namely protection against the acts of persecution envisaged by the Directive.

68 In that way, the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status.

69 Consequently, refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in Article 2(c) of the Directive. Such a cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.

70 In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Directive, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status.

71 That verification means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country. In accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, those authorities may take into account, inter alia, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.

72 Furthermore, Article 11(2) of the Directive provides that the change of circumstances recorded by the competent authorities must be 'of such a significant and non-temporary nature' that the refugee's fear of persecution can no longer be regarded as well founded.

73 The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive.

74 It must be pointed out that the actor or actors of protection with respect to which the reality of a change of circumstances in the country of origin is to be assessed are, under Article 7(1) of the Directive, either the State itself or the parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

75 As regards the latter point, it must be acknowledged that Article 7(1) of the Directive does not preclude the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country.

76 In view of all the foregoing considerations, the answer to the first question is that Article 11(1)(e) of the Directive is to be interpreted as meaning that:

– refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which

justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of the Directive, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of the Directive;

– for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of the Directive have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;

– the actors of protection referred to in Article 7(1)(b) of the Directive may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory.

The second question

77 Having regard to the answer given to the first question and the information provided in paragraphs 74 and 75 of this judgment, there is no need to answer the second question.

78 Nevertheless, as regards Question 2(b), it is important to point out, in any event, that, in connection with the concept of 'international protection', the Directive governs two distinct systems of protection, that is to say, firstly, refugee status and, secondly, subsidiary protection status, in view of the fact that Article 2(e) of the Directive states that a person eligible for subsidiary protection is one 'who does not qualify as a refugee'.

79 Therefore, as there would otherwise be a failure to have regard for the respective domains of the two systems of protection, the cessation of refugee status cannot be made conditional on a finding that a person does not qualify for subsidiary protection status.

80 Within the system of the Directive, the possible cessation of refugee status occurs without prejudice to the right of the person concerned to request the granting of subsidiary protection status in the case where all the factors, referred to in Article 4 of the Directive, which are necessary to establish that he qualifies for such protection under Article 15 of the Directive are present.

The third question

Preliminary observations

81 The third question relates to the situation in which it is assumed that a finding has already been made that the circumstances on the basis of which refugee status was granted have ceased to exist.

82 It concerns the conditions under which the competent authorities then verify, if necessary, before finding that that status has ceased to exist, whether there are other circumstances which may give rise to a well-founded fear of persecution on the part of the person concerned.

83 That verification therefore implies an assessment analogous to that carried out during the examination of an initial application for the granting of refugee status.

Question 3(a)

84 By Question 3(a) the referring court asks, in essence, whether, when the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of the Directive, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

85 In that regard it must be borne in mind that:

– that standard of probability applies to the assessment of the extent of the risk of actually suffering acts of persecution in a particular situation, as established in the context of the cooperation between the Member State and the person concerned, to which Articles 4(1) and 14(2) of the Directive refer;

– under Article 9(1) of the Directive, the relevant facts examined must be sufficiently serious.

86 It must be acknowledged that the level of difficulty encountered, first, in gathering the relevant elements for the purposes of the assessment of the circumstances may, solely from the perspective of the relevance of the facts, prove to be higher or lower from one case to another.

87 In that regard, a person who, after having resided for a number of years as a refugee outside of his country of origin, relies on other circumstances to found a fear of persecution does not normally have the same opportunities to assess the risk to which he would be exposed in his country of origin as does an applicant who has recently left his country of origin.

88 By contrast, the standard which must then guide the assessment of the elements present does not vary, either at the stage of the examination of an application for refugee status or at the stage of the examination of the question of whether that status should be maintained, when, after the circumstances which led to the granting of that status have ceased to exist, other circumstances which may have given rise to a well-founded fear of acts of persecution are assessed.

89 At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution.

90 That assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union.

91 The answer to Question 3(a) is therefore that, when the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of the Directive, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

Question 3(b)

92 By Question 3(b) the referring court asks, in essence, whether, in so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of the Directive applies when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of the Directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee.

93 In that regard, it must be stated that Article 4(4) of the Directive applies when the competent authorities have to assess whether the circumstances which they are examining justify a well-founded fear of persecution on the part of the applicant.

94 That is the situation, first and foremost, at the stage of the examination of an initial application for the granting of refugee status, when the applicant relies on earlier acts or threats of persecution as indications of the validity of his fear that the persecution in question will recur if he returns to his country of origin. The evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection.

95 In the situation envisaged by the question referred, the assessment to be carried out by the competent authorities as to the existence of circumstances other than those on the basis of which refugee status was granted is, as has been pointed out in paragraph 83 of the present judgment, analogous to that carried out during the examination of an initial application.

96 Consequently, in that situation, Article 4(4) of the Directive may be applicable where there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

97 That may be the case, in particular, where the refugee relies on a reason for persecution other than that accepted at the time when refugee status was granted and:

– prior to his initial application for international protection, he suffered acts or threats of persecution on account of that other reason, but did not then rely on them;

– he suffered acts or threats of persecution for that reason after he left his country of origin and those acts or threats originate in that country.

98 By contrast, where the refugee, relying on the same reason for persecution as that accepted at the time when refugee status was granted, submits to the competent authorities that the cessation of the facts which gave rise to the granting of that status was followed by the occurrence of other facts which gave rise to a fear of persecution for that same reason, the assessment to be carried out will normally be covered, not by Article 4(4) of the Directive, but by Article 11(2) thereof.

99 It is under Article 11(2) of the Directive that the competent authorities must assess whether the alleged change of circumstances – for example, the disappearance of one actor of persecution followed by the appearance of another actor of persecution – is of such a significant nature that the refugee's fear of persecution can no longer be regarded as well founded.

100 The answer to Question 3(b) is therefore that:

– in so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of the Directive may apply when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of the Directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee;

– however, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

Costs

101 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:**

– **refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of Directive 2004/83, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of Directive 2004/83;**

– **for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;**

– **the actors of protection referred to in Article 7(1)(b) of Directive 2004/83 may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory.**

2. **When the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of Directive 2004/83, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.**

3. **In so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of Directive 2004/83 may apply when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of that directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee. However, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.**

c) CJEU C-31/09, Bolbol, 17 June 2010

JUDGMENT OF THE COURT (Grand Chamber)

17 June 2010 (*)

(Directive 2004/83/EC – Minimum standards for the qualification and status of third country nationals or stateless persons as refugees – Stateless person of Palestinian origin who has not sought protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – Application for refugee status – Refusal based on a failure to meet the conditions laid down in Article 1A of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 – Right of that stateless person to be recognised as a refugee on the basis of the second sentence of Article 12(1)(a) of Directive 2004/83)

In Case C-31/09,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Fővárosi Bíróság (Hungary), made by decision of 15 December 2008, received at the Court on 26 January 2009, in the proceedings

Nawras Bolbol

v

Bevándorlási és Állampolgársági Hivatal,

THE COURT (Grand Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'the Directive').

2 The reference has been made in the course of proceedings between Ms Bolbol, a stateless person of Palestinian origin, and Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship; 'BAH') concerning the refusal of BAH to grant Ms Bolbol's application for refugee status.

Legal context

International law

Convention relating to the Status of Refugees

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

4 The first subparagraph of Article 1A(2) of the Geneva Convention provides that the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

5 Article 1D of the Geneva Convention provides:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.'

United Nations Conciliation Commission for Palestine

6 The United Nations Conciliation Commission for Palestine (UNCCP) was established by United Nations General Assembly Resolution No 194 (III) of 11 December 1948. Under paragraph 11 of that resolution, the United Nations General Assembly:

'*Resolves* that the refugees wishing to return to their homes in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the [UNCCP] to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.'

United Nations Relief and Works Agency for Palestine Refugees in the Near East

7 United Nations General Assembly Resolution No 302 (IV) of 8 December 1949 established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Its mandate has been regularly renewed, and its current mandate expires on 30 June 2011. UNRWA's area of operation covers the Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip.

8 Under paragraph 20 of Resolution No 302 (IV), the United Nations General Assembly:

'*Directs* [UNRWA] to consult with [the UNCCP] in the best interests of their respective tasks, with particular reference to paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948.'

9 In accordance with paragraph 6 of United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967, the General Assembly:

'*Endorses* … the efforts of the Commissioner-General of [UNRWA] to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities.'

10 Under paragraphs 1 to 3 of United Nations General Assembly Resolution No 63/91 of 5 December 2008, the General Assembly:

'1. *Notes with regret* that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly resolution 194 (III), has not yet been effected, and that, therefore, the situation of the Palestine refugees continues to be a matter of grave concern and the Palestine refugees continue to require assistance to meet basic health, education and living needs;

2. *Also notes with regret* that the [UNCCP] has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194 (III), and reiterates its request to the [UNCCP] to continue exerting efforts towards the implementation of that paragraph and to report to the Assembly as appropriate, but no later than 1 September 2009;

3. *Affirms* the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services for the well-being and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees'.

The United Nations High Commissioner for Refugees

11 Under paragraph 7(c) of the annex to United Nations General Assembly Resolution No 428 (V), of 14 December 1950, on the Statute of the Office of the High Commissioner for Refugees (UNHRC), the mandate of the High Commissioner for Refugees, as defined in that statute, '… shall not extend to a person … who continues to receive from other organs or agencies of the United Nations protection or assistance'.

European Union legislation

12 Recitals 2 and 3 in the preamble to the Directive state:

'(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention …, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention … provide[s] the cornerstone of the international legal regime for the protection of refugees.'

13 Recital 6 in the preamble to the Directive states:

'The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'

14 Under Recital 10 in the preamble to the Directive:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

15 Recitals 16 and 17 of the preamble to the Directive state:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.'

16 Pursuant to Article 2(c) to (e) of the Directive, for the purposes of that directive:

'(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.

17 Articles 13 and 18 of the Directive provide that the Member States are to grant refugee status or subsidiary protection status to third country nationals who qualify as refugees in accordance with Chapters II and III or Chapters II and V of that directive respectively.

18 Chapter III of the Directive on qualification for being a refugee includes, under the heading 'Exclusion', Article 12(1)(a) which provides:

'A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive'.

19 Article 13 of the Directive provides:

'Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.'

20 Chapter VII of the Directive, entitled 'Content of International Protection', includes Article 21(1) which provides:

'Member States shall respect the principle of non-refoulement in accordance with their international obligations.'

21 In accordance with Articles 38 and 39, the Directive entered into force on 20 October 2004 and had to be transposed by 10 October 2006 at the latest.

National legislation

22 Article 3(1) of Law No CXXXIX of 1997 on asylum (*Magyar Közlöny* 1997/112 (XII.15.); 'the Law on Asylum'), provides:

'Subject to the exception provided for in Article 4, the refugee authority shall, upon application, recognise as a refugee a foreigner who proves or provides prima facie evidence that the provisions of the Geneva Convention apply to him under Article 1A and B(1)(b) of the Geneva Convention, and Article 1(2) and (3) of the Protocol.'

23 Pursuant to Article 38(2) of the Law on Asylum, in a decision refusing an application for asylum, the competent authority is to confirm whether there is a prohibition against refoulement and/or expulsion.

24 Article 51(1) of Law No II of 2007 on the Entry and Stay of third country nationals (a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény, *Magyar Közlöny* 2007/1 (I.5.)) provides:

'Third country nationals may not be returned or expelled to the territory of a country that fails to satisfy the criterion of safe country of origin or safe third country in respect of the person in question, in particular where the third country national is likely to be persecuted for reasons of race, religion, nationality or membership of a particular social group, nor to the territory or border of a country where there is good reason to believe that the expelled third country national is likely to be subjected to torture or cruel, inhuman or degrading treatment or punishment.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

25 It is clear from the order for reference that Ms Bolbol, after having left the Gaza Strip in the company of her husband, arrived in Hungary with a visa on 10 January 2007. There, she subsequently obtained a residence permit from the immigration authority.

26 On 21 June 2007, in case her residence permit was not extended, she submitted an application for asylum to BAH, citing the unsafe situation in the Gaza Strip caused by the daily clashes between Fatah and Hamas. Ms Bolbol based her application on the second subparagraph of Article 1D of the Geneva Convention, pointing out that she was a Palestinian residing outside UNRWA's area of operations. Of her family members, only her father remained in the Gaza Strip.

27 According to the order for reference, Ms Bolbol has not availed herself of the protection or assistance of UNRWA. She claims however to be entitled to such protection and assistance, relying in support of that claim on a UNRWA registration card issued to the family of her father's cousins. In the absence of any documentary evidence, the defendant in the main proceedings disputes the family connection on which Ms Bolbol relies. In addition, despite the steps taken by Ms Bolbol at UNRWA, it has been unable to confirm her right to be registered on the basis of her family connections.

28 In its decision of 14 September 2007, the defendant in the main proceedings refused Ms Bolbol's application for asylum, but at the same time found that she could not be expelled.

29 The refusal of Ms Bolbol's application for asylum is based on Article 3(1) of the Law on Asylum. According to the grounds for refusal of the application, the second subparagraph of Article 1D of the Geneva Convention does not require unconditional recognition as a refugee but defines the category of persons to whom the provisions of the Geneva Convention apply. It follows that Palestinians must also be given access to the asylum procedure and that it is necessary to examine whether they meet the definition of 'refugee' for the purposes of Article 1A of that convention. According to that decision, it is not possible to grant Ms Bolbol refugee status because Article 1A of the Geneva Convention does not apply to her, since she did not leave her country of origin owing to persecution for reasons of race, religion, nationality or because of political persecution.

30 It is apparent from the order for reference that Ms Bolbol benefits from a prohibition on expulsion on the basis of Article 38 of the Law on Asylum and Article 51(1) of Law No II of 2007 on Entry and Stay, on the grounds that the readmission of Palestinians was at the discretion of the Israeli authorities and Ms Bolbol would be exposed to torture or inhuman and degrading treatment in the Gaza Strip on account of the critical conditions there.

31 Ms Bolbol has requested the referring court to vary BAH's decision and grant her refugee status pursuant to the second subparagraph of Article 1D of the Geneva Convention which, in her view, is a separate basis for recognition as a refugee. Since she meets the conditions laid down in that provision, she is entitled to recognition as a refugee irrespective of whether she qualifies as a refugee under Article 1A. According to Ms Bolbol, the purpose of Article 1D is to make clear that where a person registered or entitled to be registered with UNRWA resides, for any reason, outside UNRWA's area of operations and, for good reason, cannot be expected to return there, the States party to the Geneva Convention must automatically grant him refugee status. In view of the fact that, through her father, she is entitled to be registered with UNRWA, but resides in Hungary and therefore outside its area of operations, she should be recognised as a refugee without further examination.

32 The defendant in the main proceedings contends that the action should be dismissed, maintaining that Ms Bolbol's application for refugee status is unfounded since she did not leave her country for any of the reasons set out in Article 1A of the Geneva Convention, and that Article 1D does not automatically grant a basis for refugee status but is merely a provision concerning the Convention's scope *ratione personae*. Therefore, Palestinians are entitled to refugee status only where they meet the definition of 'refugee' within the meaning of Article 1A of the Geneva Convention, which must be determined on a case-by-case basis.

33 The referring court observes that the point of law raised in the main proceedings must be resolved in the light of Article 12(1)(a) of the Directive. As the originating application in the main proceedings was lodged on 21 June 2007, a date by which that provision had not yet been transposed into Hungarian domestic law, the provisions of European Union law should, in this instance, be applied directly.

34 According to the referring court, Article 1D of the Geneva Convention is open to a number of interpretations. In October 2002, the United Nations High Commissioner for Refugees issued a 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees'. However, that note fails to provide sufficiently clear and unequivocal guidance to guarantee consistent application of that provision with regard to Palestinians. As the Directive includes a reference to Article 1D of the Geneva Convention, the Court has jurisdiction to interpret the meaning of that article of the Convention.

35 In those circumstances, the Fővárosi Bíróság (Budapest Municipal Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope *ratione personae* of the Directive?'

The questions referred for a preliminary ruling

Preliminary observations

36 The Directive was adopted on the basis of, inter alia, point (1)(c) of the first subparagraph of Article 63 EC which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees.

37 It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 52).

38 The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54).

The first question

39 By its first question, the referring court asks whether, for the purposes of the first sentence of Article 12(1)(a) of the Directive, a person receives protection and assistance from an agency of the United Nations other than UNHCR by virtue of the mere fact that that person is entitled to that protection or assistance, or must that person have availed himself of that protection or assistance.

40 At the outset, it should be borne in mind that, in the context of a reference for a preliminary ruling, it is for the national court to establish the facts.

41 As was stated in paragraph 27 above, Ms Bolbol has not availed herself of the protection or assistance of UNRWA.

42 Chapter III of the Directive, on qualification for being a refugee, includes Article 12(1)(a) which states that a third country national or a stateless person is excluded from being a refugee, if 'he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the [UNHCR]'.

43 Article 1D of the Geneva Convention provides that it does not apply 'to persons who are at present receiving … protection or assistance' from such an organ or agency of the United Nations.

44 It is not in dispute that UNRWA constitutes one of the organs or agencies of the United Nations other than UNHCR which are referred to in Article 12(1)(a) of the Directive and in Article 1D of the Geneva Convention, since it was created in the light of the specific situation of Palestinian refugees receiving protection or assistance from UNRWA, as is apparent in particular from the proposal for a Council Directive presented by the Commission on 12 September 2001 (COM(2001) 510 final).

45 As the Advocate General observes at points 12 and 13 of her Opinion, it is clear from UNRWA's 'Consolidated Eligibility and Registration Instructions' ('CERI') – the currently applicable version of which was adopted during 2009 – that while the term 'Palestine Refugee' applies, for UNRWA's purposes, to 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict' (Point III.A.1 of CERI), other persons are also eligible to receive protection or assistance from UNRWA. They include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (Point III.B of CERI; see also, inter alia, paragraph 6 of the United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967).

46 In those circumstances, it cannot be ruled out *a priori* that a person such as Ms Bolbol, who is not registered with UNRWA, could nevertheless be among those persons coming within Article 1D of the Geneva Convention and, therefore, within the first sentence of Article 12(1)(a) of the Directive.

47 Contrary to the line of argument developed by the United Kingdom Government, it cannot be maintained, as an argument against including persons displaced following the 1967 hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention, and therefore, by Article 12(1)(a) of the Directive.

48 The Geneva Convention, in its original 1951 version, was amended by the Protocol on the Status of Refugees of 31 January 1967 specifically to allow the interpretation of that convention to adapt and to allow account to be taken of new categories of refugees, other than those who became refugees as a result of 'events occurring before 1 January 1951'.

49 Therefore, in order to determine whether a person such as Ms Bolbol comes within a situation envisaged by the first sentence of Article 12(1)(a) of the Directive, it must be ascertained, as the referring court asks, whether it suffices that such a person is eligible to receive the assistance provided by UNRWA or whether it must be established that he has availed himself of that assistance.

50 Article 1D of the Geneva Convention, to which Article 12(1)(a) of the Directive refers, merely excludes from the scope of that convention those persons who are 'at present receiving' protection or assistance from an organ or agency of the United Nations other than UNHCR.

51 It follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.

52 While registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means.

53 In those circumstances, the answer to the first question referred is that, for the purposes of the first sentence of Article 12(1)(a) of Directive 2004/83, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

54 It should be added that persons who have not actually availed themselves of protection or assistance from UNRWA, prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) of the Directive.

The second and third questions

55 As has been pointed out in paragraph 41 above, Ms Bolbol has not availed herself of protection or assistance from UNRWA.

56 In those circumstances, and in the light of the reply to the first question, it is not necessary to reply to the other questions referred.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

For the purposes of the first sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

d) CJEU C-57/09 and C-101/09, Bundesrepublik Deutschland, 9 November 2010

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2010 (*)

(Directive 2004/83/EC – Minimum standards for the grant of refugee status or of subsidiary protection – Article 12 – Exclusion from refugee status – Article 12(2)(b) and (c) – Notion of 'serious non-political crime' – Notion of 'acts contrary to the purposes and principles of the United Nations' – Membership of an organisation involved in terrorist acts – Subsequent inclusion of that organisation on the list of persons, groups and entities which forms the Annex to Common Position 2001/931/CFSP – Individual responsibility for part of the acts committed by that organisation – Conditions – Right of asylum by virtue of national constitutional law – Compatibility with Directive 2004/83/EC)

In Joined Cases C-57/09 and C-101/09,

REFERENCES for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesverwaltungsgericht (Germany), made by decisions of 14 October and 25 November 2008, received by the Court on 10 February and 13 March 2009 respectively, in the proceedings

Bundesrepublik Deutschland

v

B (C-57/09)**,**

D (C-101/09)**,**

intervening parties:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (C-57/09 and C-101/09)**,**

Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge (C-101/09)**,**

THE COURT (Grand Chamber),

gives the following

Judgment

1 These references for a preliminary ruling concern (i) the interpretation of Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'Directive 2004/83') and (ii) the interpretation of Article 3 of that directive.

2 The references have been made in proceedings between, on the one hand, the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), in turn represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees; 'the Bundesamt'), and, on the other, B (C-57/09) and D (C-101/09), Turkish nationals of Kurdish origin. The proceedings concern the Bundesamt's rejection of B's application for asylum and recognition of refugee status and its revocation of D's refugee status and right of asylum.

Legal context

International law

The Convention Relating to the Status of Refugees

3 The Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the 1951 Geneva Convention').

4 Article 1A of the 1951 Geneva Convention defines, inter alia, the term 'refugee' for the purposes of that act, and Article 1F states:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

…

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

5 Article 33 of the 1951 Geneva Convention, entitled 'Prohibition of expulsion or return ("*refoulement*")', provides:

'1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

The European Convention for the Protection of Human Rights and Fundamental Freedoms

6 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Resolutions of the UN Security Council

7 On 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, the UN Security Council adopted Resolution 1373 (2001) on the basis of Chapter VII of the Charter of the United Nations.

8 The preamble to Resolution 1373 (2001) reaffirms 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts'.

9 Under point 5 of that resolution, it is declared that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and … knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

10 On 12 November 2001, the UN Security Council adopted Resolution 1377 (2001), in which it '*[s]tresses* that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any

other form of support for acts of international terrorism are similarly contrary to the purposes and principles of [that Charter]'.

European Union ('EU') legislation

Directive 2004/83

11 Recital (3) in the preamble to Directive 2004/83 states that the 1951 Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.

12 Recital (6) to Directive 2004/83 states that the main objective of that directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.

13 Recital (9) to Directive 2004/83 is worded as follows:

'Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.'

14 Recital (10) to Directive 2004/83 states that the directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights. In particular it seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum.

15 Recitals (16) and (17) to that directive are worded as follows:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the [1951] Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [1951] Geneva Convention.'

16 Recital (22) to Directive 2004/83 states:

'Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".'

17 In accordance with Article 1 of Directive 2004/83, the purpose of that directive is, inter alia, to lay down minimum standards in relation to the conditions which third country nationals or stateless persons must meet in order to receive international protection and in relation to the content of the protection granted.

18 Article 2 of Directive 2004/83 states that, for the purposes of that directive:

'(a) "international protection" means the refugee and subsidiary protection status as defined in (d) and (f);

…

(c) "refugee" means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee;

…

(g) "application for international protection" means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

…'

19 Article 3 of Directive 2004/83 provides:

'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.'

20 Paragraphs 2 and 3 of Article 12 of Directive 2004/83, which is entitled 'Exclusion' and forms part of Chapter III of the directive, itself entitled 'Qualification for being a refugee', provide:

'2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

…

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.'

21 Articles 13 and 18 of Directive 2004/83 state that Member States are to grant refugee status or subsidiary protection status to a third country national who satisfies the conditions laid down in Chapters II and III or Chapters II and V, respectively, of that directive.

22 Article 14 of Directive 2004/83, which is entitled 'Revocation of, ending of or refusal to renew refugee status' and forms part of Chapter IV of the directive, itself entitled 'Refugee status', provides:

'1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

…

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

…'

23 Paragraphs 1 and 2 of Article 21 of Directive 2004/83, which forms part of Chapter VII of the Directive, entitled 'Content of international protection', provide:

'1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.'

24 In accordance with Articles 38 and 39 of that directive, Directive 2004/83 entered into force on 9 November 2004 and had to be transposed into national law by 10 October 2006 at the latest.

Common Position 2001/931/CFSP

25 In order to implement Resolution 1373 (2001), the Council of the European Union adopted, on 27 December 2001, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

26 Under Article 1(1) of Common Position 2001/931, that act applies to 'persons, groups and entities involved in terrorist acts' and listed in the Annex thereto.

27 Paragraphs 2 and 3 of Article 1 of Common Position 2001/931 provide that, for the purposes of that act:

‘2. … “persons, groups and entities involved in terrorist acts” shall mean:

– persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,

– groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

3. … “terrorist act” shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

…

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

…

(k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

…’

28 Common Position 2001/931 includes an Annex entitled ‘First list of persons, groups and entities referred to in Article 1 …’. Initially, neither the DHKP/C nor the PKK were on that list.

29 The content of that annex was updated by Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L 116, p. 75).

30 In that annex, as updated, the list set out in Section 2 (‘Groups and entities’) names as entries 9 and 19, respectively, the ‘Kurdistan Workers’ Party (PKK)’ and the ‘Revolutionary People’s Liberation Army/Front/Party (DHKP/C), (a.k.a. Devrimci Sol (Revolutionary Left), Dev Sol)’. Those organisations have subsequently been retained on the list referred to in Article 1(1) and (6) of Common Position 2001/931 by subsequent Council Common Positions, and most recently by Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931 (OJ 2010 L 178, p. 28).

Framework Decision 2002/475/JHA

31 Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3) requires Member States to take the necessary measures to ensure that the intentional acts referred to in that provision – which, given their nature or context, may seriously damage a country or an international organisation where committed with one of the aims also listed in that provision – are deemed to be terrorist offences.

32 Paragraph 2 of Article 2 of Framework Decision 2002/475, which is entitled ‘Offences relating to a terrorist group’, provides:

‘Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

…

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.’

National legislation

33 Article 16a(1) of the Grundgesetz (Basic Law) provides:

‘Persons persecuted on political grounds shall have the right of asylum.’

34 Paragraph 1 of the German Law on asylum procedure (Asylverfahrensgesetz; ‘the AsylVfG’), in the version published on 2 September 2008 (BGBl. 2008 I, p. 1798), states that that Law applies to foreigners who apply for protection from political persecution in accordance with Paragraph 16a(1) of the Basic Law, or for protection from persecution in accordance with the 1951 Geneva Convention.

35 Paragraph 2 of the AsylVfG provides that, in the Federal territory, persons entitled to asylum are to have the legal status defined by the 1951 Geneva Convention.

36 Refugee status was initially governed by Paragraph 51 of the Law on the entry and stay of foreigners on Federal territory (Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet; 'the Ausländergesetz').

37 The Law on combating international terrorism of 9 January 2002 (Gesetz zur Bekämpfung des internationalen Terrorismus, BGBl. 2002 I, p. 361; 'the Terrorismusbekämpfungsgesetz') introduced, for the first time, in the second sentence of Paragraph 51(3) of the Ausländergesetz, with effect from 11 January 2002, grounds for exclusion reflecting those laid down in Article 1F of the 1951 Geneva Convention.

38 By the Law implementing European Union Directives on the right of residence and asylum of 19 August 2007 (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, BGBl. 2007 I, p. 1970), which entered into force on 28 August 2007, the Federal Republic of Germany transposed Directive 2004/83, among others, into national law.

39 Currently, the conditions for being considered a refugee are laid down in Paragraph 3 of the AsylVfG. Under Paragraph 3(1) and (2) of the AsylVfG:

'1. A foreign national is a refugee within the meaning of [the 1951 Convention] if, in his State of nationality, he is exposed to threats within the meaning of Paragraph 60(1) of the [Law on the residence, work and integration of foreign nationals on Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet; 'the Aufenthaltsgesetz')].

2. A foreign national shall not be accorded refugee status under subparagraph 1 if there are serious reasons for considering that:

…

(2) he has committed a serious non-political crime outside the Federal territory prior to his admission as a refugee, in particular a cruel action, even if committed with a purportedly political objective, or

(3) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The first sentence shall apply also to foreign nationals who have instigated, or otherwise participated in, the commission of those crimes or acts.'

40 The grounds for exclusion listed in Paragraph 3(2) of the AsylVfG replaced, with effect from 28 August 2007, the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, which had itself replaced the second sentence of Paragraph 51(3) of the Ausländergesetz.

41 Paragraph 60(1) of the Aufenthaltsgesetz, in the version published on 25 February 2008 (BGBl. 2008 I, p. 162), provides:

'Pursuant to the [1951 Geneva] Convention, a foreign national may not be deported to a State in which his life or liberty is under threat on account of his race, religion, nationality, membership of a certain social group or political convictions. …'

42 The first sentence of Paragraph 73(1) of the AsylVfG provides that '[r]ecognition of a right of asylum and of refugee status shall be revoked without delay if the conditions on which such recognition is based are no longer satisfied'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-57/09

43 Born in 1975, B entered Germany at the end of 2002, where he applied for asylum and for protection as a refugee and, in the alternative, for an order prohibiting his deportation to Turkey.

44 In support of his application, B stated, inter alia, that, in Turkey, he had been a sympathiser of Dev Sol (now DHKP/C) when still a schoolboy and that, from the end of 1993 until the beginning of 1995, he had supported armed guerrilla warfare in the mountains.

45 After being arrested in February 1995, he had been subjected to serious physical abuse and had been forced to give a statement under torture.

46 In December 1995, he had been sentenced to life imprisonment.

47 In 2001, while he was in custody, B had been given another life sentence after he had confessed to killing a fellow prisoner suspected of being an informant.

48 In December 2002, B took advantage of a six-month conditional release from custody on health grounds to leave Turkey and make his way to Germany.

49 By decision of 14 September 2004, the Bundesamt rejected B's application for asylum as unfounded and found that the conditions laid down in Paragraph 51(1) of the Ausländergesetz were not satisfied. The Bundesamt took the view that, since B had committed serious non-political crimes, he fell into the second exclusion category, laid down in the second sentence of Paragraph 51(3) of the Ausländergesetz (referred to subsequently in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, then in Paragraph 3(2)(2) of the AsylVfG).

50 In the same decision, the Bundesamt also held that there were no obstacles to B's deportation to Turkey under the applicable law and declared him liable to deportation to that country.

51 By judgment of 13 June 2006, the Verwaltungsgericht Gelsenkirchen (Administrative Court, Gelsenkirchen) annulled the decision of the Bundesamt and ordered that authority to grant B asylum and to declare that his deportation to Turkey was prohibited.

52 By judgment of 27 March 2007, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia) dismissed the appeal brought by the Bundesamt against the judgment of the Verwaltungsgericht Gelsenkirchen, on the view that B should be granted a right of asylum in accordance with Paragraph 16a of the Grundgesetz, together with refugee status.

53 The Oberverwaltungsgericht found, in particular, that the exclusion clause relied upon by the Bundesamt must be understood to the effect that it does not seek only to punish a serious non-political crime committed in the past, but also to forestall the danger which the applicant could pose to the host Member State, and that the application of that clause requires an overall assessment of the particular case in the light of the principle of proportionality.

54 The Bundesamt appealed against that judgment on a point of law ('Revision') before the Bundesverwaltungsgericht (Federal Administrative Court), relying on the second and third exclusion clauses laid down in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz (and subsequently in Paragraph 3(2)(2) and (3) of the AsylVfG) and arguing that, contrary to the approach adopted by the appeal court, those two exclusion clauses do not imply that there must be a danger to the security of the Federal Republic of Germany; nor do they entail the need for an assessment of proportionality with regard to the particular case.

55 Furthermore, according to the Bundesamt, the exclusion clauses laid down in Article 12(2) of Directive 2004/83 are among those principles from which, by virtue of Article 3 of that directive, Member States cannot derogate.

Case C-101/09

56 Since May 2001, D, who was born in 1968, has resided in Germany where, on 11 May 2001, he applied for asylum.

57 In support of his application, he stated, inter alia, that, in 1990, he had fled to the mountains where he joined the PKK. He had been a guerrilla fighter for the PKK and one of its senior officials. At the end of 1988, the PKK had sent him to northern Iraq.

58 Because of political differences with its leadership, D had left the PKK in May 2000 and since then had been under threat. He had stayed on in northern Iraq for about one more year, but had not been safe there.

59 In May 2001, the Bundesamt granted D asylum and recognised his right to refugee status under the national law in force at that time.

60 Following the entry into force of the Terrorismusbekämpfungsgesetz, the Bundesamt initiated a revocation procedure and by decision of 6 May 2004, pursuant to Paragraph 73(1) of the AsylVfG, it revoked the decision granting D a right of asylum and refugee status. The Bundesamt found that there were serious reasons for considering that D had committed a serious non-political crime outside Germany before being admitted to its territory as a refugee and that he had been guilty of acts contrary to the purposes and principles of the United Nations.

61 By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirchen annulled that revocation decision.

62 The appeal brought by the Bundesamt was dismissed by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen by judgment of 27 March 2007. On grounds similar to those underpinning the judgment handed down on the same day in the case concerning B, the Oberverwaltungsgericht held that the exclusion clauses laid down in the German legislation did not apply in D's case either.

63 The Bundesamt appealed that judgment on a point of law ('Revision'), its grounds of appeal being, in substance, analogous to those relied upon in support of the appeal in the case concerning B.

The questions referred and the procedure before the Court

64 The Bundesverwaltungsgericht points out that, according to the findings of the appeal court, by which it is bound, B and D would not, in the event of their return to their country of origin, be sufficiently safe from renewed persecution. The Bundesverwaltungsgericht infers from this that the positive conditions for being considered a refugee are satisfied in both cases. Nevertheless, B and D will not be able to have their refugee status recognised if one of the exclusion clauses laid down in Article 12(2) of Directive 2004/83 applies.

65 The Bundesverwaltungsgericht states that, if one of those exclusion clauses were to apply, B and D would be entitled to have their right of asylum recognised under Article 16a of the Grundgesetz, which does not exclude any category of persons from that right.

66 Lastly, the Bundesverwaltungsgericht points out that neither exclusion under Article 12 of Directive 2004/83 nor a finding that Article 16a of the Grundgesetz is incompatible with Directive 2004/83 would necessarily lead B and D to lose the right to remain in Germany.

67 It is against that background that the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases before it, the following five questions – the first and fifth of which differ slightly on account of the particular facts of each of those cases – to the Court for a preliminary ruling:

'(1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of [Directive 2004/83] if

– the person seeking asylum was a member of an organisation which is included in the list of persons, groups and entities annexed to the … Common Position [2001/931] and employs terrorist methods, and the appellant has actively supported that organisation's armed struggle? (Case C-57/09)

– a foreign national was for many years involved as a combatant and an official – including for a time as a member of its governing body – in an organisation (in this case, the PKK) which repeatedly employed terrorist methods in the armed struggle waged against the State (in this case, Turkey) and is included in the list of persons, groups and entities annexed to the … Common Position [2001/931], and the foreign national thereby actively supported its armed struggle in a prominent position? (Case C-101-09)

(2) If Question 1 is to be answered in the affirmative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83] … require that the foreign national continue to constitute a danger?

(3) If Question 2 is to be answered in the negative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83]… require that a proportionality test be undertaken in relation to the individual case?

(4) If Question 3 is to be answered in the affirmative:

(a) Is it to be taken into account in considering proportionality that the foreign national enjoys protection against deportation under Article 3 of the [ECHR] or under national rules?

(b) Is exclusion disproportionate only in exceptional cases having particular characteristics?

(5) Is it compatible with Directive 2004/83, for the purposes of Article 3 of [Directive 2004/83] …, if

– the appellant has a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied? (Case C-57/09)

– the foreign national continues to be recognised as having a right of asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied and refugee status under Article 14(3) of the directive is revoked? (Case C-101/09)'

68 By order of the President of the Court of 4 May 2009, Cases C-57/09 and C-101/09 were joined for the purposes of the written and oral procedure and of the judgment.

Jurisdiction of the Court

69 In the cases before the referring court, the Bundesamt adopted the contested decisions on the basis of the legislation applicable before the entry into force of Directive 2004/83, that is to say, before 9 November 2004.

70 As a consequence, those decisions, which have given rise to the present references for a preliminary ruling in the present case, do not fall within the scope *ratione temporis* of Directive 2004/83.

71 It should nevertheless be borne in mind that where the questions referred by national courts concern the interpretation of a provision of Community law, the Court is in principle obliged to give a ruling. In particular, neither the wording of Articles 68 EC and 234 EC nor the aim of the procedure established by Article 234 EC indicates that those responsible for framing the EC Treaty intended to exclude from the jurisdiction of the Court references for a preliminary ruling on a directive in the specific case where the national law of a Member State refers to the content of provisions of an international agreement which have been re-stated in that directive, in order to determine the rules applicable to a situation which is purely internal to that State. In such a case, it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of that international agreement which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply (see, by analogy, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 48).

72 The Bundesverwaltungsgericht points out, in the cases before it, that the Terrorismusbekämpfungsgesetz introduced into the national law grounds for excluding a person from refugee status which correspond in substance to those laid down in Article 1F of the 1951 Geneva Convention. Given that the grounds for exclusion laid down in Article 12(2) of Directive 2004/83 also correspond in substance to those laid down in Article 1F of that Convention, it follows that the exclusion clauses which were considered and applied by the Bundesamt in both the decisions at issue before the referring court, which were adopted before Directive 2004/83 entered into force, correspond in substance to the exclusion clauses subsequently inserted in the directive.

73 Moreover, as regards the decision of the Bundesamt to revoke the decision according refugee status to D, it should be noted that Article 14(3)(a) of Directive 2004/83 requires the competent authorities of a Member State to revoke refugee status if ever they establish, after according that status, that the person 'should have been or is excluded' from being a refugee, in accordance with Article 12 of the directive.

74 In contrast with the ground for revocation laid down in Article 14(1) of Directive 2004/83, the ground laid down in Article 14(3)(a) is not subject to transitional arrangements and cannot be limited to applications made or decisions taken after the directive entered into force. Nor is its application discretionary, like the grounds for revocation laid down in Article 14(4).

75 Accordingly, the questions referred for a preliminary ruling must be answered.

Consideration of the questions referred

Preliminary observations

76 One of the legal bases for Directive 2004/83 was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to 'the qualification of nationals of third countries as refugees'.

77 Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (*Salahadin Abdulla and Others*, paragraph 52, and Case C-31/09 *Bolbol* [2010] ECR I-0000, paragraph 37).

78 Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54, and *Bolbol*, paragraph 38).

The first question

79 By its first question in each case, the Bundesverwaltungsgericht asks, in substance, whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that person has actively supported the armed struggle waged by that organisation – and perhaps occupied a prominent position within that organisation – is a case of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(b) or (c) of Directive 2004/83.

80 In order to answer that question, which seeks to elicit the extent to which a person's membership of an organisation on that list can bring that person within the scope of points (b) and (c) of Article 12(2) of Directive 2004/83, it is necessary at the outset to ascertain whether the acts committed by such an organisation can, as the national court assumes, fall within the categories of the serious crimes and the acts referred to in those points.

81 First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b).

82 Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to 'measures combating international terrorism.'

83 Those include Resolutions 1373 (2001) and 1377 (2001) of the UN Security Council, from which it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations.

84 It follows that – as is argued in their written observations by all the Governments which submitted such observations to the Court, and by the European Commission – the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension.

85 Next, the question arises as to what extent membership of such an organisation implies that the person concerned falls within the scope of Article 12(2)(b) and (c) of Directive 2004/83 where he has actively supported the armed struggle waged by that organisation, possibly occupying a prominent position within that organisation.

86 On that point, it should be noted that points (b) and (c) of Article 12(2) of Directive 2004/83 – in the same way, moreover, as points (b) and (c) of Article 1F of the 1951 Geneva Convention – permit the exclusion of a person from refugee status only where there are 'serious reasons' for considering that 'he … has committed' a serious non-political crime outside the country of refuge prior to his admission as a refugee or that 'he … has been guilty' of acts contrary to the purposes and principles of the United Nations.

87 It is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the Member State concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses.

88 As a consequence, first, even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions.

89 There is no direct relationship between Common Position 2001/931 and Directive 2004/83 in terms of the aims pursued, and it is not justifiable for a competent authority, when considering whether to exclude a person from refugee status pursuant to Article 12(2) of the directive, to base its decision solely on that person's membership of an organisation which is on a list adopted outside the framework set up by Directive 2004/83 consistently with the 1951 Geneva Convention.

90 However, the inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor which the competent authority must take into account when determining, initially, whether that group has committed acts falling within the scope of Article 12(2)(b) or (c) of Directive 2004/83.

91 In that regard, it is important to note that the circumstances in which the two organisations to which the respondents before the Bundesverwaltungsgericht respectively belonged were placed on that list cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83.

92 Nor, secondly, and contrary to the submissions of the Commission, can participation in the activities of a terrorist group, within the meaning of Article (2)(2)(b) of Framework Decision 2002/475, come necessarily and automatically within the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83.

93 Not only was Framework Decision 2002/475, like Common Position 2001/931, adopted against a background different from the context of Directive 2004/83, which is essentially humanitarian, but the intentional act of participating in the activities of a terrorist group, which is defined in Article 2(2)(b) of that Framework Decision and which the Member States were required to make punishable under their national law, is not such as to trigger the automatic application of the exclusion clauses laid down in Article 12(2)(b) and (c) of the directive, which presuppose a full investigation into all the circumstances of each individual case.

94 It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83.

95 Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.

96 That individual responsibility must be assessed in the light of both objective and subjective criteria.

97 To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

98 Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted.

99 In the light of all the foregoing considerations, the answer to the first question referred in each of the two cases is that Article 12(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that:

– the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations';

– the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.

The second question

100 By its second question in each of the cases, the Bundesverwaltungsgericht wishes to know whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon the person concerned continuing to represent a danger for the host Member State.

101 It is appropriate to point out first that, within the system of Directive 2004/83, any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) of that directive, pursuant to which Member States may revoke refugee status where, in particular, there are reasonable grounds for regarding the person concerned as a danger to security and (ii) Article 21(2) of the directive, which provides that the host Member State may – as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention – *refoule* a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State.

102 Under points (b) and (c) of Article 12(2) of Directive 2004/83, which are analogous to points (b) and (c) of Article 1F of the 1951 Geneva Convention, a third country national is excluded from refugee status where there are serious reasons for considering that 'he … has

committed' a serious non-political crime outside the country of refuge 'prior to his … admission as a refugee' or that he 'has been guilty' of acts contrary to the purposes and principles of the United Nations.

103 In accordance with the wording of the provisions in which they are laid down, both those grounds for exclusion are intended as a penalty for acts committed in the past, as has been pointed out by all the Governments which submitted observations and by the Commission.

104 In that regard it should be pointed out that the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.

105 In those circumstances, the answer to the second question is that exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.

The third question

106 By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon a proportionality test being undertaken in relation to the particular case.

107 In that regard, it should be borne in mind that it is clear from the wording of Article 12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12.

108 Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive.

109 Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.

110 It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin.

111 The answer to the third question is that the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

The fourth question

112 In view of the answer given to the third question, there is no need to answer the fourth question referred by the Bundesverwaltungsgericht in each of these two cases.

The fifth question

113 By its fifth question in both cases, the Bundesverwaltungsgericht wishes, in substance, to know whether it is compatible with Directive 2004/83, for the purposes of Article 3 of that directive, for a Member State to recognise that a person excluded from refugee status pursuant to Article 12(2) of the directive has a right of asylum under its constitutional law.

114 In that regard, it should be borne in mind that Article 3 permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee in so far, however, as those standards are compatible with Directive 2004/83.

115 In view of the purpose underlying the grounds for exclusion laid down in Directive 2004/83, which is to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention, the reservation in Article 3 of the directive precludes Member States from introducing or retaining provisions granting refugee status under Directive 2004/83 to persons who are excluded from that status pursuant to Article 12(2).

116 However, it is clear from the closing words of Article 2(g) of Directive 2004/83 that the directive does not preclude a person from applying for 'another kind of protection' outside the scope of Directive 2004/83.

117 Directive 2004/83, like the 1951 Geneva Convention, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12(2) of the directive to remain in the territory of the Member State concerned.

118 The grant by a Member State of such national protection status, for reasons other than the need for international protection within the meaning of Article 2(a) of Directive 2004/83 – that is to say, on a discretionary and goodwill basis or for humanitarian reasons – does not, as is stated in recital 9, fall within the scope of that directive.

119 That other kind of protection which Member States have discretion to grant must not, however, be confused with refugee status within the meaning of Directive 2004/83, as the Commission, amongst others, has rightly stated.

120 Accordingly, in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the directive, they do not infringe the system established by that directive.

121 In the light of those considerations, the answer to the fifth question referred is that Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

Costs

122 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:**

– **the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations';**

– **the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.**

2. **Exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.**

3. **The exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.**

4. **Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.**

e) ECtHR, Saadi v. Italy, 28 February 2008

In the case of Saadi v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of: (…)

Having deliberated in private on 11 July 2007 and 23 January 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37201/06) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Tunisian national, Mr Nassim Saadi ("the applicant"), on 14 September 2006.

2. -8.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1974 and lives in Milan.

10. The applicant, who entered Italy at some unspecified time between 1996 and 1999, held a residence permit issued for "family reasons" by the Bologna police authority (*questura*) on 29 December 2001. This permit was due to expire on 11 October 2002.

A. The criminal proceedings against the applicant in Italy and Tunisia

11. On 9 October 2002 the applicant, was arrested on suspicion of involvement in international terrorism (Article 270 *bis* of the Criminal Code), among other offences, and placed in pre-trial detention. He and five others were subsequently committed for trial in the Milan Assize Court.

12. The applicant faced four charges. The first of these was conspiracy to commit acts of violence (including attacks with explosive devices) in States other than Italy with the aim of spreading terror. It was alleged that between December 2001 and September 2002 the applicant had been one of the organisers and leaders of the conspiracy, had laid down its ideological doctrine and given the necessary orders for its objectives to be met. The second charge concerned falsification "of a large number of documents such as passports, driving licences and residence permits". The applicant was also accused of receiving stolen goods and of attempting to aid and abet the entry into Italian territory of an unknown number of aliens in breach of the immigration legislation.

13. At his trial the prosecution called for the applicant to be sentenced to thirteen years' imprisonment. The applicant's lawyer asked the Assize Court to acquit his client of international terrorism and left determination of the other charges to the court's discretion.

14. In a judgment of 9 May 2005 the Milan Assize Court altered the legal classification of the first offence charged. It took the view that the acts of which he stood accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four years and six months' imprisonment for that offence, for the forgery and receiving offences. It acquitted the applicant of aiding and abetting clandestine immigration, ruling that the acts he stood accused of had not been committed.

15. As a secondary penalty the Assize Court banned the applicant from exercising public office for a period of five years and ordered that after serving his sentence he was to be deported.

16. In the reasons for its judgment, which ran to 331 pages, the Assize Court observed that the evidence against the applicant included intercepts of telephone and radio communications, witness statements and numerous false documents that had been seized. Taken together, this evidence proved that the applicant had been engaged in a conspiracy to receive and falsify stolen documents, an activity from which he derived his means of subsistence. On the other hand, it had not been established that the documents in question had been used by the persons in whose names they had been falsely made out to enter Italian territory illegally.

17. As regards the charge of international terrorism, the Assize Court first noted that a conspiracy was "terrorist" in nature where its aim was to commit violent acts against civilians or persons not actively participating in armed conflict with the intention of spreading terror or obliging a government or international organisation to perform or refrain from performing any

act, or where the motive was political, ideological or religious in nature. In the present case it was not known whether the violent acts which the applicant and his accomplices were preparing to commit, according to the prosecution submissions, were to be part of an armed conflict or not.

18. In addition, the evidence taken during the investigation and trial was not capable of proving beyond a reasonable doubt that the accused had begun to put into practice their plan of committing acts of violence, or that they had provided logistical or financial support to other persons or organisations having terrorist aims. In particular, such evidence was not provided by the telephone and radio intercepts. These proved only that the applicant and his accomplices had links with persons and organisations belonging to Islamic fundamentalist circles, that they were hostile to "infidels" (and particularly those present in territories considered to be Muslim) and that their relational world was made up of "brothers" united by identical religious and ideological beliefs.

19. Using coded language the defendants and their correspondents had repeatedly mentioned a "football match", intended to strengthen their faith in God. For the Assize Court it was quite obvious that this was not a reference to some sporting event but to an action applying the principles of the most radical form of Islam. However, it had not been possible to ascertain what particular "action" was meant or where it was intended to take place.

20. Moreover, the applicant had left Milan on 17 January 2002 and, after a stopover in Amsterdam, made his way to Iran, from where he had returned to Italy on 14 February 2002. He had also spoken of a "leader of the brothers" who was in Iran. Some members of the group to which the applicant belonged had travelled to "training camps" in Afghanistan and had procured weapons, explosives and observation and video recording equipment. In the applicant's flat and those of his co-defendants the police had seized propaganda about jihad – or holy war – on behalf of Islam. In addition, in telephone calls to members of his family in Tunisia made from the place where he was being detained in Italy, the applicant had referred to the "martyrdom" of his brother Fadhal Saadi; in other conversations he had mentioned his intention to take part in holy war.

21. However, no further evidence capable of proving the existence and aim of a terrorist organisation had been found. In particular, there was no evidence that the applicant and his accomplices had decided to channel their fundamentalist faith into violent action covered by the definition of a terrorist act. Their desire to join a jihad and eliminate the enemies of Islam could very well be satisfied through acts of war in the context of an armed conflict, that is, acts not covered by the concept of "terrorism". It had not been established whether the applicant's brother had really died in a suicide bombing or whether that event had been the "football match" which the defendants had repeatedly referred to.

22. The applicant and the prosecution appealed. The applicant asked to be acquitted of all the charges, while the prosecution wanted him to be convicted of international terrorism and aiding and abetting clandestine immigration too.

23. In the prosecution's appeal it was submitted that, according to the case-law of the Court of Cassation, the constituent elements of the crime of international terrorism were made out even where no act of violence had occurred, the existence of a plan to commit such an act being sufficient. In addition, an action could be terrorist in nature even if it was intended to be carried out in the context of an armed conflict, provided that the perpetrators were not members of the "armed forces of a State" or an "insurrectionary group". In the present case, it was apparent from the documents in the file that the applicant and his associates had procured for themselves and others false documents, weapons, explosives and money in order to commit violent acts intended to affirm the ideological values of fundamentalist Islam. In addition, the accused had maintained contacts with persons and organisations belonging to the sphere of international terrorism and had planned a violent and unlawful action, due to be carried out in October 2002 as part of a "holy war" and in a country other than Italy. Only the defendants' arrest had prevented the plan being implemented. Furthermore, at that time the armed conflict in Afghanistan had ended and the one in Iraq had not yet started.

24. The prosecution further submitted that the applicant's brother, Mr Fadhal Saadi, had been detained in Iran; the applicant had visited him there in either January or February 2002. After his release Mr Fadhal Saadi had settled in France and stayed in contact with the applicant. He had then died in a suicide bombing, a fact which was a source of pride for the applicant and the other members of his family. That was revealed by the content of the telephone conversations intercepted in the prison where the applicant was being held.

25. Lastly, the prosecution requested leave to produce new evidence, namely letters and statements from a person suspected of terrorist activities and recordings transmitted by radio microphone from inside a mosque in Milan.

26. On 13 March 2006 the Milan Assize Court of Appeal asked the Constitutional Court to rule on the constitutionality of Article 593 § 2 of the Code of Criminal Procedure ("the CCP"). As amended by Law no. 46 of 20 February 2006, that provision permitted the defence and the prosecution to appeal against acquittals only where, after the close of the first-instance

proceedings, new evidence had come to light or been discovered. The Assize Court of Appeal stayed the proceedings pending a ruling by the Constitutional Court.

27. In judgment no. 26 of 6 February 2007 the Constitutional Court declared the relevant provisions of Italian law unconstitutional in that they did not allow the prosecution to appeal against all acquittals and because they provided that appeals lodged by the prosecuting authorities before the entry into force of Law no. 46 of 20 February 2006 were inadmissible. The Constitutional Court observed in particular that Law no. 46 did not maintain the fair balance that should exist in a criminal trial between the rights of the defence and those of the prosecution.

28. The first hearing before the Milan Assize Court of Appeal was set down for 10 October 2007.

29. In the meantime, on 11 May 2005, two days after delivery of the Milan Assize Court's judgment, a military court in Tunis had sentenced the applicant in his absence to twenty years' imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. He was also deprived of his civil rights and made subject to administrative supervision for a period of five years. The applicant asserted that he had not learned of his conviction until, the judgment having become final, its operative part was served on his father on 2 July 2005.

30. The applicant alleged that his family and his lawyer were not able to obtain a copy of the judgment by which the applicant had been convicted by the Tunis military court. In a letter of 22 May 2007 to the President of Tunisia and the Tunisian Minister of Justice and Human Rights, his representatives before the Court asked to be sent a copy of the judgment in question. The result of their request is not known.

B. The order for the applicant's deportation and his appeals against its enforcement and for the issue of a residence permit and/or the granting of refugee status

31. On 4 August 2006, after being imprisoned uninterruptedly since 9 October 2002, the applicant was released.

32. On 8 August 2006 the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of Legislative decree no. 144 of 27 July 2005 (entitled "urgent measures to combat international terrorism" and later converted to statute law in the form of Law no. 155 of 31 July 2005). He observed that "it was apparent from the documents in the file" that the applicant had played an "active role" in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. Consequently, his conduct was disturbing public order and threatening national security.

33. The Minister made it clear that the applicant could not return to Italy except on the basis of an *ad hoc* ministerial authorisation.

34. The applicant was taken to a temporary holding centre (*centro di permanenza temporanea*) in Milan. On 11 August 2006, the deportation order was confirmed by the Milan justice of the peace.

35. On 11 August 2006 the applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and "political and religious reprisals". By a decision of 16 August 2006 the head of the Milan police authority (*questore*) declared the request inadmissible on the ground that the applicant was a danger to national security.

36. On 6 September 2006 the director of a non-governmental organisation, the World Organisation Against Torture (known by its French initials – OMCT), wrote to the Italian Prime Minister to tell him the OMCT was "extremely concerned" about the applicant's situation, and that it feared that, if deported to Tunisia, he would be tried again for the same offences he stood accused of in Italy. The OMCT also pointed out that, under the terms of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

37. On 12 September 2006 the president of another non-governmental organisation, the Collective of the Tunisian community in Europe, appealed to the Italian Government to "end its policy of mass deportation of Tunisian immigrants [who were] practising adherents of religious faiths". He alleged that the Italian authorities were using inhuman methods and had grounded a number of decisions against Tunisians on their religious convictions. He went on to say that it was "obvious" that on arrival in Tunisia the persons concerned would be "tortured and sentenced to lengthy terms of imprisonment, on account of the fact that the Italian authorities falsely suspect them of terrorism". The applicant's name appeared in a list of persons at imminent risk of expulsion to Tunisia which was appended to the letter of 12 September 2006.

38. The chief constable's decision of 16 August 2006 (see paragraph 35 above) was served on the applicant on 14 September 2006. The applicant did not appeal. However, on 12 September 2006 he had produced documents, including the OMCT's letter of 6 September 2006 and the reports on Tunisia by Amnesty International and the US State Department, requesting that these be passed on to the local refugee status board. On 15 September 2006 the Milan police authority informed the applicant orally that as his asylum request had been refused the documents in question could not be taken into consideration.

39. On 14 September 2006, pleading Rule 39 of the Rules of Court, the applicant asked the Court to suspend or annul the decision to deport him to Tunisia. On 15 September 2006 the Court decided to ask the Italian Government to provide it with information, covering in particular the question whether the applicant's conviction by the Tunis military court was final and also whether in Tunisian law there was a remedy whereby it was possible to obtain the reopening of proceedings or a retrial.

40. The Government's reply was received at the Registry on 2 October 2006. According to the Italian authorities, in the event of a conviction in the absence of the accused, Tunisian law gave the person convicted the right to have the proceedings reopened. The Government referred in particular to a fax of 29 September 2006 from the Italian ambassador in Tunis stating that, according to the information supplied by the Director of International Cooperation at the Tunisian Ministry of Justice, the applicant's conviction was not final since a person convicted in his absence could appeal against the relevant judgment.

41. On 5 October 2006 the Court decided to apply Rule 39. It asked the Government to stay the applicant's expulsion until further notice.

42. The maximum time allowed for the applicant's detention with a view to expulsion expired on 7 October 2006 and he was released on that date. However, on 6 October 2006 a new deportation order had been issued against him. On 7 October 2006 this order was served on the applicant, who was then taken back to the Milan temporary holding centre. As the applicant had stated that he had entered Italy from France, the new deportation order named France as the receiving country, not Tunisia. On 10 October 2006 the new deportation order was confirmed by the Milan justice of the peace.

43. On 3 November 2006 the applicant was released because fresh information indicated that it was impossible to deport him to France. On the same day the Milan Assize Court of Appeal ordered precautionary measures, to take effect immediately after the applicant's release: he was forbidden to leave Italian territory and required to report to a police station on Mondays, Wednesdays and Fridays.

44. In the meantime, on 27 September 2006, the applicant had applied for a residence permit. On 4 December 2006 the Milan police authority replied that this application could not be allowed. It was explained that a residence permit could be issued "in the interests of justice" only at the request of the judicial authorities, where the latter considered that the presence of an alien in Italy was necessary for the proper conduct of a criminal investigation. The applicant had in any case been forbidden to leave Italian territory and was therefore obliged to stay in Italy. Moreover, to obtain a residence permit it was necessary to produce a passport or similar document.

45. Before the Court the applicant alleged that the Tunisian authorities had refused to renew his passport, so that all his further attempts to regularise his situation had come to nothing.

46. On a date which has not been specified the applicant also asked the Lombardy Regional Administrative Court ("the RAC") to set aside the deportation order of 6 October 2006 and stay its execution.

47. In a decision of 9 November 2006 the Lombardy RAC held that there was no cause to rule on the application for a stay of execution and ordered the file to be transmitted to the Lazio RAC, which had the appropriate territorial jurisdiction.

48. The Lombardy RAC pointed out among other observations that the European Court of Human Rights had already requested a stay of execution of the deportation order and had consequently provided redress for any prejudice the applicant might allege.

49. According to the information supplied by the applicant on 29 May 2007, the proceedings in the Lazio RAC were still pending on that date.

50. On 18 January 2007 the applicant sent a memorial to the Milan police authority pointing out that the European Court of Human Rights had requested a stay of execution of his deportation on account of a real risk that he would be subjected to treatment contrary to Article 3 of the Convention. He therefore asked for a hearing before the local refugee status board with a view to being granted political asylum. According to the information supplied by the applicant on 11 July 2007, there had been no reply to his memorial by that date. In a memorandum of 20 July 2007 the Italian Ministry of the Interior stated that the memorial of 18 January 2007 could not be regarded as a new asylum request or as an appeal against the refusal given by the Milan chief constable on 16 August 2006 (see paragraph 35 above).

C. The diplomatic assurances requested by Italy from Tunisia

51. On 29 May 2007 the Italian embassy in Tunis sent a note verbale to the Tunisian Government requesting diplomatic assurances that if the applicant were to be deported to Tunisia he would not be subjected to treatment contrary to Article 3 of the Convention and would not suffer a flagrant denial of justice.

52. The note in question, written in French, reads as follows:

> "The Italian embassy presents its compliments to the Ministry of Foreign Affairs and, following the meeting between the Italian ambassador Mr Arturo Olivieri and his Excellency the Minister of Justice and Human Rights Mr Béchir Tekkari, on the occasion of the visit of the Italian Minister of Justice Mr Clemente Mastella, on 28 May 2007, has the honour to request the precious collaboration of the Tunisian authorities in reaching a positive development in the following case.
>
> The Tunisian national Nassim Saadi, born in Haidra (Tunisia) on 30.11.1974, was served with an order for his deportation from Italy, issued by the Ministry of the Interior on 08.08.2006.
>
> After the above order had been issued Mr Saadi lodged an application with the European Court of Human Rights on 14.09.2006, requesting and obtaining the decision to stay execution of the deportation order.
>
> His application is based on the argument that after being tried in his absence he was sentenced to 20 years' imprisonment for terrorist-related offences, in a judgment given by the Tunis military court on 11.05.2005, served on Mr Saadi's father on 02.07.2005. Because of his conviction, Mr Saadi contends that if the deportation order were to be enforced he would run the risk of being imprisoned in Tunisia on his arrival, on the basis of an unfair trial, and of being subjected to torture and inhuman and degrading treatment (please find enclosed a copy of the document by which the judgment was served supplied by Mr Saadi).
>
> In order to gather all the information necessary to assess the case, the European Court of Human Rights has asked the Italian Government to supply a copy of the judgment and wishes to ascertain whether the Italian Government intend, before deporting Mr Saadi, to seek diplomatic guarantees from the Tunisian Government.
>
> In the light of the foregoing, the Italian embassy, counting on the sensitivity of the Tunisian authorities on the question, has the honour to formulate, subject to the judicial prerogatives of the Tunisian State, the following urgent request for guarantees, as an indispensable formal prerequisite for the solution of the case now pending:
>
> - if the information given by Mr Saadi concerning the existence of a judgment of 11.05.2005 in which he was found guilty by the Tunis military court corresponds to the truth, please send a full copy of the judgment in question (before 11.07.2007, the date of the hearing before the Court) and confirm that he has the right to appeal, and to be judged by an independent and impartial tribunal, in accordance with a procedure which, taken as a whole, complies with the principles of a fair and public trial;
>
> - please give assurances that the fears expressed by Mr Saadi of being subjected to torture and inhuman and degrading treatment on his return to Tunisia are unfounded;
>
> - please give assurances that if he were to be committed to prison he would be able to receive visits from his lawyers and members of his family.
>
> In addition, the Italian embassy would be grateful if the Tunisian authorities would keep it informed of the conditions of Mr Saadi's detention if he were to be committed to prison.
>
> The way this case is determined will have significant implications for future security policy.
>
> The information mentioned above, which the European Court of Human Rights has requested from the Italian Government, are indispensable if the deportation is to go ahead.
>
> To a certain extent, this case forms a precedent (in relation to numerous other pending cases) and – we are convinced – a positive response by the Tunisian authorities will make it easier to carry out further expulsions in future.
>
> While perfectly aware of the delicate nature of the subject, the Italian embassy counts on the understanding of the Tunisian authorities, hoping that their reply will be in the spirit of effective action against terrorism, within the framework of the friendly relations between our two countries."

53. The Italian Government observed that such assurances had never before been requested from the Tunisian authorities.

54. On 4 July 2007 the Tunisian Ministry of Foreign Affairs sent a note verbale to the Italian embassy in Tunis. Its content was as follows:

> "The Minister of Foreign Affairs presents his compliments to the Italian ambassador in Tunis and, referring to the ambassador's note verbale no. 2533 of 2 July 2007 concerning Nassim Saadi, currently imprisoned in Italy, has the honour to inform the ambassador that the Tunisian Government confirm that they are prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes.
>
> The Minister of Foreign Affairs seizes this opportunity of expressing once again to the Italian ambassador in Tunis the assurance of his high regard."

55. A second note verbale, dated 10 July 2007, was worded as follows:

> "The Minister of Foreign Affairs presents his compliments to the Italian ambassador in Tunis and, referring to his note verbale no. 2588 of 5 July 2007, has the honour to confirm to him the content of the Ministry's note verbale no. 511 of 4 July 2007.
>
> The Minister of Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.
>
> The Minister of Foreign Affairs seizes this opportunity of expressing once again to the Italian ambassador in Tunis the assurance of his high regard."

D. The applicant's family situation

56. According to the applicant, in Italy he lives with an Italian national, Mrs V., whom he married in a Muslim marriage ceremony. They have an eight-year-old child (born on 22 July 1999), an Italian national, who attends school in Italy. Mrs V. is unemployed and is not at present in receipt of any family allowance. She suffers from a type of ischaemia.

57. According to a memorandum of 10 July 2007 from the Ministry of the Interior, on 10 February 2007 the applicant married, in a Muslim marriage ceremony, a second wife, Mrs G. While officially resident in via Cefalonia, Milan, at the address occupied by Mrs V., the applicant is said to be separated *de facto* from both his wives. Since the end of 2006 he has been habitually resident in via Ulisse Dini, Milan, in a flat which he apparently shares with other Tunisians.

II. RELEVANT DOMESTIC LAW

A. Remedies against a deportation order in Italy

58. A deportation order is subject to appeal to the RAC, the court having jurisdiction to examine the lawfulness of any administrative decision and set it aside where it disregards an individual's fundamental rights (see, for example, *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I). An appeal to the *Consiglio di Stato* lies against decisions of the RAC.

59. In proceedings before the RAC a stay of execution of the administrative decision complained of is not automatic, but may be granted if requested (see *Sardinas Albo*, previously cited decision). However, where – as in the applicant's case – deportation has been ordered under the terms of Legislative Decree no. 144 of 2005, appeals to the RAC or the *Consiglio di Stato* cannot stay enforcement of the deportation order (Article 4 §§ 4 and 4*bis* of the Legislative Decree).

B. Reopening of a trial conducted in the defendant's absence in Tunisia

60. In the French translation produced by the Government the relevant provisions of the Tunisian Code of Criminal Procedure read as follows:

Article 175

> "Where a defendant fails to appear on the appointed date, having been personally informed of the obligation to do so, the court shall proceed to judgment, giving a decision which is deemed to follow adversarial proceedings. Where a defendant who fails to appear has been lawfully summoned, though not informed in person, judgment is given by default. Notification of judgment by default shall be given by the registrar of the court which gave judgment.
>
> An appeal against a judgment by default must be lodged by the appellant in person, or his representative, with the registry of the court which has given judgment, within the ten days following service of the defendant's copy.

If the appellant lives outside Tunisian territory, the time allowed for appeal shall be increased to thirty days.

An appeal shall be lodged either by means of a verbal declaration, which shall be formally recorded forthwith, or by means of a written declaration. The appellant must sign; if he refuses or is unable to sign, that circumstance shall be formally recorded.

The registrar shall immediately fix a date for the hearing and inform the appellant thereof; in all cases the hearing must be held within one month from the date of the appeal.

The appellant or his representative shall inform the interested parties, with the exception of State counsel, and have them summoned by an officer of the court, at least three days before the date of the hearing, failing which the appeal shall be dismissed."

Article 176

"Where judgment has not been served on the defendant in person or where it does not appear from the documents recording enforcement of the judgment that the defendant had knowledge of it, an appeal shall lie until expiry of the limitation period applicable to the penalty concerned."

Article 180 (as amended by Law no. 2004-43 of 17 April 2000)

"On appeal, execution of a judgment shall be stayed. Where the sentence is capital punishment, the appellant shall be committed to prison and the sentence shall not be enforced before the judgment has become final."

Article 213

"An appeal shall no longer be admissible, save where the appellant has been prevented from appealing by circumstances beyond his or her control, unless lodged within ten days of the date of delivery of the judgment deemed to be adversarial within the meaning of the first paragraph of Article 175, or after expiry of the time allowed where judgment has been given by default, or after notification of the judgment likewise by default.

For State counsel and assistant State counsel at courts of appeal the time allowed for appeal shall be sixty days from the date of delivery of the judgment. In addition, on pain of inadmissibility, they must give notice of their appeal within that time to the defendant and any persons found liable towards civil parties."

III. INTERNATIONAL TEXTS AND DOCUMENTS

A. The cooperation agreement on crime prevention signed by Italy and Tunisia and the association agreement between Tunisia, the European Union and its member States

61. On 13 December 2003 the Italian and Tunisian Governments signed in Tunis an agreement on crime prevention in which the Contracting Parties undertook to exchange information (particularly with regard to the activities of terrorist groups, migratory flows and the production and use of false documents) and to work towards harmonisation of their domestic legislation. Articles 10 and 16 of the agreement read as follows:

Article 10

"The Contracting Parties, in accordance with their respective national legislation, agree that cooperation to prevent crime, as contemplated in the present agreement, will extend to searching for persons who have sought to evade justice and are responsible for criminal offences, and recourse to expulsion where circumstances so require and in so far as compatible with application of the provisions on extradition."

Article 16

"The present agreement is without prejudice to rights and obligations arising from other international, multilateral or bilateral agreements entered into by the Contracting Parties."

62. Tunisia also signed in Brussels, on 17 July 1995, an association agreement with the European Union and its member States. The agreement mainly concerns cooperation in the commercial and economic sectors. Article 2 provides that relations between the Contracting Parties, like the provisions of the agreement itself, must be based on respect for human rights and democratic principles, which form an "essential element" of the agreement.

B. Articles 1, 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees

63. Italy is a party to the 1951 United Nations Convention on the Status of Refugees. Articles 1, 32 and 33 of this Convention read as follows:

Article 1

"For the purposes of the present Convention, the term "refugee" shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 32

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law ..."

Article 33

"1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

C. Guidelines of the Committee of Ministers of the Council of Europe

64. On 11 July 2002, at the 804th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted guidelines on human rights and the fight against terrorism. Point IV of the guidelines, entitled "Absolute prohibition of torture", reads as follows:

"The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted."

According to Point XII § 2 of this document,

"It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion."

D. Amnesty International report on Tunisia

65. In a report concerning the situation in Tunisia in 2006 Amnesty International noted that following a large number of unfair trials at least 12 persons facing terrorism charges had been sentenced to lengthy prison sentences. Cases of torture and ill-treatment continued to be reported. Hundreds of political prisoners sentenced after unfair trials remained in prison after more than ten years and their state of health was said to have deteriorated. A group of 135 prisoners had been released as a result of an amnesty; they had been imprisoned for more than 14 years after being convicted in unfair trials of belonging to the banned Islamist organisation *Ennahda*. Some of these prisoners were in poor health as a result of harsh prison conditions and torture they had undergone before standing trial.

66. In December 2006 there had been exchanges of fire to the south of Tunis between the police and alleged members of the Salafist Group for Preaching and Combat. Dozens of people had been killed and police officers had been injured.

67. In June 2006 the European Parliament had called for a meeting of the European Union and Tunisia to discuss the human-rights situation in the country. In October 2006 the European Union had criticised the Tunisian Government for cancelling an international conference on the right to work.

68. As regards the "war on terror", Amnesty International noted that no answer had been given by the Tunisian authorities to a request to visit the country made by the UN Special Rapporteur on the promotion and protection of human rights. Persons suspected of terrorist activities had been arrested and tried under what was described as the "controversial" 2003 anti-terrorism law. This anti-terrorism law and the Code of Military Justice had been used against Tunisians repatriated against their will from Bosnia-Herzegovina, Bulgaria and Italy, who were accused of belonging to terrorist organisations operating abroad. In such cases, sometimes

decided by the military courts, lawyers' contact with their clients had been subjected to constantly increasing restrictions. The report mentioned cases of prisoners being held incommunicado or being tortured while in police custody; those referred to included Mr Hicham Saadi, Mr Badreddine Ferchichi (who had been deported from Bosnia-Herzegovina) and six members of the "Zarzis group".

69. Amnesty International went on to criticise severe restrictions of the right to freedom of expression and a risk of harassment and violence against human rights defenders and their families, women wearing Islamic headscarves and opponents and critics of the government.

70. On the question of the independence of the judiciary, Amnesty International noted that lawyers had publicly protested against a bill then before parliament creating the "Higher Institute for Lawyers" to be responsible for training future lawyers (which had previously been done by the Lawyers' Association and the Association of Tunisian Judges). In October 2006 the head of the European Commission delegation in Tunis had publicly criticised the slow pace of political reform and called for better training for judges and lawyers to consolidate the independence of the judiciary. Judges required the permission of the Secretary of State for Justice to leave the country.

71. On 19 June 2007 Amnesty International issued a statement concerning the applicant which reads as follows:

> "Amnesty International is concerned that Nassim Saadi would be at risk of torture or other grave human rights violations, should he be removed to Tunisia by the Italian authorities. This concern is based upon our continuous monitoring of human rights violations in Tunisia, including violations committed against people forcibly returned from abroad within the context of the 'war on terror'.
>
> Nassim Saadi was sentenced in absentia by the Permanent Military Court in Tunis to 20 years' imprisonment on charges of belonging to a terrorist organization operating abroad at a time of peace and incitement to terrorism. Although he will be afforded a retrial before the same military court, military courts in Tunisia violate a number of guarantees for a fair trial. The military court is composed of a presiding judge and four counsellors. Only the president is a civilian judge. There are restrictions on the right to a public hearing. The location of the court in a military compound effectively limits access to the public. Individuals convicted before a military court can seek review only before the Military Court of Cassation. Civilian defendants have frequently reported that they had not been informed of their right to legal counsel or, particularly in the absence of a lawyer, have not realized that they were being questioned by an examining judge as he was in military uniform. Defence lawyers have restrictions placed on access to their clients' files and are obstructed by not being given information about the proceedings such as the dates of hearings. Unlike the ordinary criminal courts, military courts do not allow lawyers access to a register of pending cases. (for more information see Amnesty International report Tunisia: the cycle of Injustice, AI Index MDE 30/001/2003).
>
> The Tunisian authorities also continue to use the controversial 2003 anti-terrorism law to arrest, detain and try alleged terrorist suspects. Those convicted have been sentenced to long prison terms. The anti-terrorism law and provisions of the Military Justice Code have been also used against Tunisian nationals who were returned to Tunisia against their will by authorities in other countries, including Bosnia and Herzegovina, Bulgaria and Italy. Those returned from abroad were arrested by the Tunisian authorities upon arrival and many of them were charged with links to "terrorist organisations" operating outside the country. Some were referred to the military justice system.
>
> People who have been recently returned to Tunisia from abroad have been held in incommunicado detention, during which time they have been subjected to torture and other ill-treatment. They have also been sentenced to long prison sentences following unfair trials. In this connection, we provide the following case information for illustration:
>
> □– Houssine Tarkhani was forcibly returned from France to Tunisia on 3 June 2007 and detained on arrival. He was kept in secret detention in the State Security Department of the Ministry of Interior in Tunis for 10 days, during which he was reportedly tortured or otherwise ill-treated. He is currently detained in Mornaguia prison awaiting further investigation. Houssine Tarkhani left Tunisia in 1999, and subsequently lived in Germany and, between 2000 and 2006, in Italy. He was arrested at the French-German border on 5 May 2007 as an irregular migrant, and held in a detention centre in the French city of Metz, pending the execution of an expulsion order. On 6 May he was brought before a judge, who authorized his detention for a further 15 days, and informed him that he was being investigated by the French police on suspicion of "providing logistical support" to a network which assists individuals to travel to Iraq to take part in the armed conflict with the US-led coalition forces there – an allegation which he denies. No charges were ever brought against him in France. On the same day, he made a claim for asylum and on 7 May 2007 was taken to the detention centre at Mesnil-Amelot to be detained while his asylum claim was processed. Houssine Tarkhani's application for asylum had been assessed under an

accelerated procedure (procedure prioritaire), and was rejected on 25 May. Although he appealed before the Commission des Recours des Réfugiés (CRR), Refugees Appeals Board, decisions taken under the accelerated procedure are not delayed while appeals to the CRR are considered, and people who have appealed may be forcibly returned before their appeal has been ruled on. Houssine Tarkhani also made appeals against the decision to the administrative court, but these have failed.

– In May 2004, Tunisian national Tarek Belkhirat was returned against his will to Tunisia from France after his request for asylum was rejected. He was arrested upon his return to Tunisia and charged under the 2003 anti-terrorism law. In February 2005, the Council of State (Conseil d'Etat), the highest administrative court in France, quashed the order to expel Tarek Belkhirat to Tunisia. In March 2005, he was sentenced in an unfair trial in Tunisia to ten years' imprisonment for membership of the Tunisian Islamist Front, charges for which he had already served a 36-month prison in France. The sentence was reduced to five years on appeal in October 2005. He remains in prison in Tunisia.

– Tunisian national Adil Rahali was deported to Tunisia from Ireland in April 2004 after his application for asylum was refused. He was arrested on arrival in Tunisia and taken to the State Security Department of the Ministry of the Interior, where he was held in secret detention for several days and reportedly beaten, suspended from the ceiling and threatened with death. Adil Rahali, who had worked in Europe for more than a decade, was charged under the 2003 anti-terroristm law with belonging to a terrorist organization operating abroad. No investigation is known to have been conducted into Adil Rahali's alleged torture despite the fact that his lawyer filed a complaint. In march 2005, Adil Rahali was convicted on the basis of "confessions" extracted under torture and sentenced under anti-terrorism legislation to 10 years'imprisonment. This sentence was reduced to five years on appeal in September 2005. He remains in prison in Tunisia.

– In April 2004, seven young men were convicted, following an unfair trial, of membership of a terrorist organization, possessing or manufacturing explosives, theft, using banned websites and holding unauthorized meetings. Two others were convicted in absentia. They were among dozens of people arrested in Zarzis, southern Tunisia, in February 2003, most of whom had been released the same month. The trial failed to respect international fair trial standards. According to defence lawyers, most arrest dates in police reports were falsified, and in one case the place of arrest was falsified. There were no investigations into allegations that the defendants were beaten, suspended from the ceiling and threatened with rape. The convictions rested almost entirely on confessions extracted under duress. The defendants denied all charges brought against them in court. In July 2004 the Tunis Appeal Court reduced the sentences of six of them from 19 years and three months to 13 years' imprisonment. Their appeal was rejected by the Court of Cassation in December 2004. Another defendant, who was a minor at the time of the arrest, had his sentence reduced to 24 months in prison. They were all released in March 2006 following a presidential pardon.

The human rights violations that were perpetrated in these cases are typical of the sort of violations that remain current in Tunisia and affect people arrested inside the country as well as those returned from abroad in connection with alleged security or political offences. We consider, therefore, that Nassim Saadi would be at serious risk of torture and unfair trial if he were to be transferred to the custody of the Tunisian authorities."

72. A similar statement was issued by Amnesty International on 23 July 2007.

E. Report on Tunisia by Human Rights Watch

73. In its 2007 report on Tunisia Human Rights Watch asserted that the Tunisian Government used the threat of terrorism and religious extremism as a pretext for repression against their opponents. There were constant, credible allegations of the use of torture and ill-treatment against suspects in order to obtain confessions. It was also alleged that convicted persons were deliberately subjected to ill-treatment.

74. Although many members of the proscribed Islamist party *an-Nahdha* had been released from prison after an amnesty, there were more than 350 political prisoners. There had been mass arrests of young men, who had then been prosecuted under the 2003 anti-terror law. Released political prisoners were monitored very closely by the authorities, who refused to renew their passports and denied them access to most jobs.

75. According to Human Rights Watch, the judicial system lacked independence. Investigating judges questioned suspects without their lawyers being present, and the prosecution and judiciary turned a blind eye to allegations of torture, even when made through a lawyer. Defendants were frequently convicted on the basis of confessions made under duress or of statements by witnesses whom they had not been able to examine or have examined.

76. Although the International Committee of the Red Cross was continuing its programme of visits to Tunisian prisons, the authorities were refusing independent human rights defence

organisations access to places of detention. The undertaking given in April 2005 to allow visits by Human Rights Watch had remained a dead letter.

77. The 2003 "anti-terrorism" Act gave a very broad definition of "terrorism", which could be used to prosecute persons merely for exercising their right to political dissent. Since 2005 more than 200 persons had been charged with planning to join jihadist movements abroad or organising terrorist activities. The arrests had been carried out by plain-clothes police and the families of those charged had been left without news of their relatives for days or sometimes weeks. During their trials these defendants had overwhelmingly claimed the police had extracted their statements under torture or threat of torture. These defendants had been sentenced to lengthy terms of imprisonment, but it had not been established that any of them had committed a specific act of violence or that they possessed weapons or explosives.

78. In February 2006, six persons accused of belonging to the "Zarzis" terrorist group had been granted a presidential amnesty after serving three years of their prison sentences They had been convicted on the basis of confessions which they alleged they had been forced into making, and of the fact that they had copied from the internet instructions for making bombs. In 2005 Mr Ali Ramzi Bettibi had been sentenced to four years' imprisonment for cutting and pasting on an on-line forum a statement by an obscure group threatening bomb attacks if the President of Tunisia agreed to host a visit by the Israeli Prime Minister.

79. Lastly, Human Rights Watch reported that on 15 June 2006 the European Parliament had adopted a resolution deploring the repression of human rights activists in Tunisia.

F. Activities of the International Committee of the Red Cross

80. The International Committee of the Red Cross signed an agreement with the Tunisian authorities on 26 April 2005 giving them permission to visit prisons and assess conditions there. The agreement came one year after the authorities' decision to permit prison visits only by the International Committee of the Red Cross, an organisation – described as "strictly humanitarian" – which was required to maintain confidentiality about its findings. The agreement between the Tunisian Government and the International Committee of the Red Cross concerned all prison establishments in Tunisia "including remand prisons and police cells".

81. On 29 December 2005 Mr Bernard Pfefferlé, the regional delegate of the International Committee of the Red Cross for Tunisia/North Africa, said that the Committee had been able to visit "without hindrance" about a dozen prisons and meet prisoners in Tunisia. Mr Pfefferlé said that, since the beginning of the inspection in June 2005, a team from the International Committee of the Red Cross had travelled to nine prisons, two of them twice, and had met half of the prisoners scheduled to be visited. Refusing to give further details, "on account of the nature of [their] agreements", he nevertheless commented that the agreements in question authorised the International Committee of the Red Cross to visit all prisons and meet prisoners "quite freely and according to [its own] free choice".

G. Report of the US State Department on human rights in Tunisia

82. In its report on "human rights practices" published on 8 March 2006, the US State Department criticised violations of fundamental rights by the Tunisian Government.

83. Although there had been no politically-motivated killings attributable to the Tunisian authorities, the report commented critically on two cases: Mr Moncef Ben Ahmed Ouachichi had died while in police custody and Mr Beddreddine Rekeii after being released from police custody.

84. Referring to the information gathered by Amnesty International, the State Department described the various forms of torture and ill-treatment inflicted by the Tunisian authorities in order to secure confessions. These included: electric shocks; forcing the victim's head under water; beatings with fists, sticks and police batons; hanging from the cell bars until loss of consciousness; and cigarette burns. In addition, police officers sexually assaulted the wives of Islamist prisoners as a means of obtaining information or imposing a punishment.

85. However, these acts of torture were very difficult to prove, because the authorities refused to allow the victims access to medical treatment until the traces of ill-treatment had faded. Moreover, the police and the judicial authorities regularly refused to follow up allegations of ill-treatment and confessions extracted under torture were regularly admitted as evidence by the courts.

86. Political prisoners and religious fundamentalists were the main targets of torture, which was usually inflicted while the victims were in police custody, particularly inside the Ministry of the Interior. The report referred to a number of cases of torture complained of in 2005 by non-governmental organisations, including the *Conseil national pour les libertés en Tunisie* and the *Association pour la lutte contre la torture en Tunisie*. In spite of complaints by the victims, no investigation into these abuses had been conducted by the Tunisian authorities and no agent of the State had been prosecuted.

87. The conditions of incarceration in Tunisian prisons fell well below international standards. Prisoners were held in cramped conditions and had to share beds and lavatories. The risk of catching contagious diseases was very high on account of the overcrowding and the unhygienic conditions. Prisoners did not have access to appropriate medical treatment.

88. Political prisoners were often transferred from one establishment to another, which made visits by their families difficult and discouraged any investigation of their conditions of detention.

89. In April 2005, after lengthy negotiations, the Tunisian Government had signed an agreement permitting the International Red Cross to visit prisons. These visits had begun in June. In December the Red Cross declared that the prison authorities had respected the agreement and had not placed obstacles in the way of the visits.

90. On the other hand, the same possibility was not extended to Human Rights Watch, despite a verbal undertaking given in April 2005 by the Tunisian Government. The Government had also undertaken to prohibit prolonged periods of solitary confinement.

91. Although explicitly forbidden by Tunisian law, arbitrary arrest and imprisonment occurred. By law, the maximum period allowed for detention in police custody was six days, during which time the prisoners' families had to be informed. However, these rules were frequently ignored. Persons detained by the police were very often held incommunicado and the authorities extended the duration of police custody by recording a false date of arrest.

92. The Tunisian Government denied that there were any political prisoners, so their exact number was impossible to determine. However, the *Association internationale pour le soutien aux prisonniers politiques* had drawn up a list of 542 political prisoners, nearly all of whom were said to be religious fundamentalists belonging to proscribed opposition movements who had been arrested for belonging to illegal organisations which endangered public order.

93. The report mentioned a wide range of infringements of the right to respect for the private and family life of political prisoners and their families, including censorship of correspondence and telephone calls and the confiscation of identity documents.

H. Other sources

94. Before the Court the applicant produced a document from the *Association internationale de soutien aux prisonniers politiques* concerning the case of a young man named Hichem Ben Said Ben Frej who was alleged to have leapt from the window of a police station on 10 October 2006 shortly before he was due to be interrogated. Mr Ben Frej's lawyer asserted that his client had been savagely tortured and held in the cells of the Ministry of the Interior in Tunis for twenty-four days.

Similar allegations are to be found in statements by local organisations for the defence of prisoners' and women's rights and in numerous press cuttings.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

95. The applicant submitted that enforcement of his deportation would expose him to the risk of treatment contrary to Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

96. The Government rejected that argument.

A. Admissibility

97. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

98. The applicant submitted that it was "a matter of common knowledge" that persons suspected of terrorist activities, in particular those connected with Islamist fundamentalism, were frequently tortured in Tunisia. He had lodged a request for political asylum which had been refused by the Milan police authority without his being interviewed by the Italian refugee status board. His attempts to obtain a residence permit had failed because the Tunisian consulate had refused to renew his passport, a document which the Italian authorities had asked him to produce. In the aggregate these circumstances amounted to "persecution".

99. In addition, the investigations conducted by Amnesty International and by the US State Department showed that torture was practised in Tunisia and that some persons deported there had quite simply disappeared. The numerous press articles and witness accounts he had produced condemned the treatment of political prisoners and their families.

100. The applicant's family had received a number of visits from the police and was constantly subject to threats and provocations. His sister had twice tried to kill herself because of this.

101. In view of the serious risks to which he would be exposed if he were to be deported, the applicant considered that a mere reminder of the treaties signed by Tunisia could not be regarded as sufficient.

(b) The Government

102. The Government considered it necessary in the first place to provide an account of the background to the case. After the attacks of 11 September 2001 on the "twin towers" in New York the Italian police, having been tipped off by intelligence services, uncovered an international network of militant Islamists, mainly composed of Tunisians, and placed it under surveillance. In May 2002 one of the leaders of this network, Mr Faraj Faraj Hassan, was arrested in London. The applicant had in the meantime left Milan for Iran, where he had spent time in an al-Qaeda training camp. He then returned to Italy, from where he frequently travelled to the Côte d'Azur. There, with the help of another Tunisian living in San Remo, Mr Imed Zarkaoui, he met his brother, Mr Fadhal Saadi.

103. Mr Zarkaoui had been given the job of finding fulminate of mercury to make detonators, while in Italy another accomplice was seeking information about night-filming cameras. Contact was established with Malaysia, where the group which was to carry out the attacks were standing by, and weapons were distributed to some militants. The Islamist cell to which the applicant belonged had embarked on a large-scale enterprise involving the production of false identity papers and their distribution to its members. The Government rejected the applicant's argument that the offence – forgery – of which he had been convicted in Italy was not linked to the activity of terrorist groups; in that connection they pointed out that although the applicant and one of his co-defendants held legal residence permits they had provided themselves with false papers.

104. In that context, in October 2002, a number of European police forces launched "Operation Bazar", as a result of which the applicant, Mr Zarkaoui and three other persons were arrested in Italy. Mr Fadhal Saadi managed to evade an attempt by the French police to arrest him. He was later to die in a suicide bombing in Iraq. When the applicant's family informed him of this he was delighted to learn that his brother had died a "martyr" in the war against "the infidel". In the criminal proceedings against the applicant in Italy the prosecution was convinced of three things: that the cell he belonged to was associated with al-Qaeda, that it was preparing an attack against an unidentified target and that it was receiving instructions from abroad.

105. The Government next observed that a danger of death or the risk of being exposed to torture or to inhuman and degrading treatment must be corroborated by appropriate evidence. However, in the present case the applicant had neither produced precise information in that regard nor supplied detailed explanations, confining himself to describing an allegedly general situation in Tunisia. The "international sources" cited by the applicant were indeterminate and irrelevant. The same was true of the press articles he had produced, which came from unofficial circles with a particular ideological and political slant. As this information had not been checked, nor had an explanation been requested from the Tunisian Government, it had no probative value. The provocations that the applicant's family had allegedly suffered at the hands of the Tunisian police had nothing to do with what the applicant sought to prove before the Court.

106. The Amnesty International report cited three isolated cases, connected to the prevention of terrorism, which did not disclose "anything to be concerned about" (certain persons had been convicted of terrorism or were awaiting trial). Regarding the allegations of ill-treatment, the report used the conditional tense or expressions such as "it seems". There was therefore no certainty as to what had happened. The superficial nature of the report was "obvious" in the passages concerning Italy, which described as a human rights violation the deportation to Syria of Muhammad Al-Shari, whose application to the Court had been rejected as manifestly ill-founded (see *Al-Shari and Others v. Italy* (dec.), no. 57/03, 5 July 2005).

107. The report by the US State Department cited (a) the case of Moncef Louhici or Ouahichi, in which the investigation into a complaint by the family of a person allegedly killed by the police was still in progress; (b) the case of Badreddine Rekeii or Reguii, which concerned crimes without a political motivation, and about which the Tunisian authorities had provided complete and reassuring details; (c) the case of the "Bizerte" group, in which five of the eleven defendants had been acquitted on appeal and the sentences of the other six had been considerably reduced; and (d) imprecisely identified cases to which vague reference was made or cases involving offences without political motivation or concerning freedom of expression or association.

108. The Government argued that these documents did not portray Tunisia as a kind of "hell", the term used by the applicant. The situation in the country was, by and large, not very different from that in certain States which had signed the Convention.

109. The misfortunes of Mr Hichem Ben Said Ben Frej, cited by the applicant (see paragraph 94 above), were not relevant in the present case, since he had committed suicide.

110. The Government further observed that in numerous cases concerning expulsion to countries (Algeria in particular) where subjection to ill-treatment as a regular practice seemed much more alarming than in Tunisia, the Court had rejected the applicants' allegations.

111. The Government also noted that Tunisia had ratified numerous international instruments for the protection of human rights, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all adopted by the United Nations. Under Article 32 of the Tunisian Constitution, international treaties took precedence over statute law. In addition, Italy and Tunisia had signed bilateral agreements on the question of emigration and combating transnational crime, including terrorism (see paragraph 61 above). That presupposed a common basis of respect for fundamental rights. The effectiveness of the agreements concerned would be jeopardised if the Court were to assert as a principle that Tunisians could not be deported.

112. Tunisia had also signed an association agreement with the European Union. A precondition for implementation of that agreement was respect for fundamental freedoms and democratic principles (see paragraph 62 above). The European Union was an international organisation which, according to the Court's case-law, was presumed to provide a level of protection of fundamental rights "equivalent" to that provided by the Convention. Moreover, the Tunisian authorities permitted the International Red Cross and "other international bodies" to visit prisons (see paragraphs 80 and 81 above). In the Government's submission, it could be presumed that Tunisia would not default on its obligations under international treaties.

113. In Tunisia the terrorist danger was a grim reality, as shown by the explosion on Djerba on 11 April 2002, for which al-Qaeda had claimed responsibility. To meet that danger the Tunisian authorities had, like some European States, enacted a law for the prevention of terrorism.

114. In these circumstances, the "benefit of the doubt" should be given to the State which intended to deport the applicant and whose national interests were threatened by his presence. In that connection, account had to be taken of the scale of the terrorist threat in the world of today and of the objective difficulties of combating it effectively, regard being had not only to the risks in the event of deportation but also to those which would arise in the absence of deportation. In any event, the Italian legal system provided safeguards for the individual – including the possibility of obtaining refugee status – which made expulsion contrary to the requirements of the Convention "practically impossible".

115. At the hearing before the Court the Government had agreed in substance with the arguments of the third-party intervener (see paragraphs 117-123 below), observing that, before the order for the applicant's deportation was made, the applicant had neither mentioned the risk of ill-treatment in Tunisia, although he must have been aware of it, nor requested political asylum. His allegations had accordingly come too late to be credible.

116. Lastly, the Government observed that, even though there was no extradition request or a situation raising concern regarding respect for human rights (like, for example, the one described in the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V), Italy had sought diplomatic assurances from Tunisia (see paragraphs 51 and 52 above). In response, Tunisia had given an undertaking to apply in the present case the relevant Tunisian law (see paragraphs 54 and 55 above), which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner's lawyer and family.

2. The third-party intervener

117. The United Kingdom Government observed that in the *Chahal* case (cited above, § 81) the Court had stated the principle that in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures. The Government observed in that connection that it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community.

118. The individual concerned might not commit any offence (or else, before a terrorist attack, only minor ones) and it could prove difficult to establish his involvement in terrorism beyond a reasonable doubt, since it was frequently impossible to use confidential sources or information supplied by intelligence services. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement provided only partial protection.

119. Terrorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights. According to a well-established principle of international law, States could use immigration legislation to protect themselves from external threats to their national security. The Convention did not guarantee the right to political asylum. This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations. Moreover, Article 5 § 1 (f) of the Convention authorised the arrest of a person "against whom action is being taken with a view to deportation...", and thus recognised the right of States to deport aliens.

120. It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.

121. In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of "degrading treatment". And the nature of the threat presented by an individual to the signatory State also varied significantly.

122. In the light of the foregoing considerations, the United Kingdom argued that, in cases concerning the threat created by international terrorism, the approach followed by the Court in the *Chahal* case (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned must prove that it was "more likely than not" that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture, which had been based on the case-law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

123. Lastly, the United Kingdom Government emphasised that Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention. Although, in the above-mentioned *Chahal* case, the Court had considered it necessary to examine whether such assurances provided sufficient protection, it was probable, as had been shown by the opinions of the majority and the minority of the Court in that case, that identical assurances could be interpreted differently.

3. The Court's assessment

(a) General principles

i. Responsibility of Contracting States in the event of expulsion

124. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 102, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, § 38).

125. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 34; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

126. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

127. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, judgment of 8 January 1978, Series A no. 25, § 163; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia,* no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal,* cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).

ii. Material used to assess the risk of exposure to treatment contrary to Article 3 of the Convention

128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see *Chahal*, cited above, § 96).

129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).

131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, *Chahal*, cited above, §§ 99-100; *Müslim v. Turkey*, no.°53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, 5 July 2005; and *Al-Moayad v. Germany* (dec.), no.°35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Müslim*, cited above, § 68).

132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-149).

133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85 and 86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

iii. The concepts of "torture" and "inhuman or degrading treatment"

134. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom,* no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

135. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

136. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aydin v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 82, and *Selmouni*, cited above, § 96).

(b) Application of the above principles to the present case

137. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence (see *Chahal*, cited above, § 79, and S*hamayev and Others*, cited above, § 335). It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.

138. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 130 above). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Chahal*, cited above, § 80 and paragraph 63 above). Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (see paragraph 64 above).

139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see paragraph 122 above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs).

141. The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.

142. Furthermore, the Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment (see *Jabari*, cited above, § 39) in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof (see paragraphs 128 and 132 above) before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting the *Chahal* judgment it has only rarely reached such a conclusion.

143. In the present case the Court has had regard, firstly, to the reports of Amnesty International and Human Rights Watch on Tunisia (see paragraphs 65-79 above), which describe a disturbing situation. The conclusions of those reports are corroborated by the report of the US State Department (see paragraphs 82-93 above). In particular, these reports mention numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act. The practices reported – said to be often inflicted on persons in police custody with the aim of extorting confessions – include hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns, all of these being practices which undoubtedly reach the level of severity required by Article 3. It is reported that allegations of torture and ill-treatment are not investigated by the competent Tunisian authorities, that they refuse to follow up complaints and that they regularly use confessions obtained under duress to secure convictions (see paragraphs 68, 71, 73-75, 84 and 86 above). Bearing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that those conclusions are corroborated in substance by numerous other sources (see paragraph 94 above), the Court does not doubt their reliability. Moreover, the respondent Government have not adduced any evidence or reports capable of rebutting the assertions made in the sources cited by the applicant.

144. The applicant was prosecuted in Italy for participation in international terrorism and the deportation order against him was issued by virtue of Legislative decree no. 144 of 27 July 2005 entitled "urgent measures to combat international terrorism" (see paragraph 32 above). He was also sentenced in Tunisia, in his absence, to twenty years' imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. The existence of that sentence was confirmed by Amnesty International's statement of 19 June 2007 (see paragraph 71 above).

145. The Court further notes that the parties do not agree on the question whether the applicant's trial in Tunisia could be reopened. The applicant asserted that it was not possible for him to appeal against his conviction with suspensive effect, and that, even if he could, the Tunisian authorities could imprison him as a precautionary measure (see paragraph 154 below).

146. In these circumstances, the Court considers that in the present case substantial grounds have been shown for believing that there is a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention if he were to be deported to Tunisia. That risk cannot be excluded on the basis of other material available to the Court. In particular, although it is true that the International Committee of the Red Cross has been able to visit Tunisian prisons, that humanitarian organisation is required to maintain confidentiality about its fieldwork (see paragraph 80 above) and, in spite of an undertaking given in April 2005, similar visiting rights have been refused to the independent human-rights-protection organisation Human Rights Watch (see paragraphs 76 and 90 above). Moreover, some of the acts of torture reported allegedly took place while the victims were in police custody or pre-trial detention on the premises of the

Ministry of the Interior (see paragraphs 86 and 94 above). Consequently, the visits by the International Committee of the Red Cross cannot exclude the risk of subjection to treatment contrary to Article 3 in the present case.

147. The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian Government asked the Tunisian Government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (see paragraphs 51 and 52 above). However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad (see paragraph 54 above). It was only in a second note verbale, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions" (see paragraph 55 above). In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

149. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

150. The applicant alleged that the criminal proceedings against him in Tunisia had not been fair and that his expulsion would expose him to the risk of a flagrant denial of justice. He relied on Article 6 of the Convention, the relevant parts of which provide:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

151. The Government rejected that argument.

A. Admissibility

152. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

153. The applicant submitted that there was a serious risk of a denial of justice in Tunisia, where the minimal safeguards provided by international law were disregarded. All Tunisians accused in Italy of terrorist activities had had unfair trials after being repatriated. The applicant cited as typical in that respect the case of Mr Loubiri Habib, who had been acquitted of terrorism charges by the Italian courts but imprisoned in Tunisia and deprived of the possibility of seeing

his family. Mr Loubiri had succeeded in obtaining "revision" of the Tunisian criminal proceedings which had resulted in his conviction, but the revision proceedings in the Military High Court in Tunis had resulted in a substantial increase in his sentence, from ten to thirty years' imprisonment.

154. The applicant further observed that the operative part of the judgment pronouncing his conviction *in absentia* had been served on his father, Mr Mohamed Cherif, on 2 July 2005. As a result, an appeal was no longer possible. In any event, even supposing that an appeal was possible and that such an appeal could stay execution of the sentence, that would not prevent the Tunisian authorities from imprisoning him as a precautionary measure. Moreover, in view of the serious infringements of political prisoners' civil rights in Tunisia, even the theoretical possibility of an appeal out of time could not exclude the risk of a flagrant denial of justice. In addition, it could not be known with certainty whether the court having jurisdiction to hear such an appeal would be a civilian or a military court of appeal.

155. Lastly, the applicant noted that the trial had been conducted in Tunisia in a military court and that the defendant in such proceedings had no possibility of adducing evidence, appointing a lawyer or addressing the court. Moreover, in the present case, neither his family nor his lawyers had been able to obtain a copy of the military court's judgment (see paragraph 30 above).

(b) The Government

156. The Government asserted that because the file did not contain the original or a certified copy of the judgment against the applicant given in Tunisia it was impossible to check whether the information he had supplied was correct. They further submitted that an expulsion could engage the responsibility of the Contracting State under Article 6 only in exceptional circumstances, in particular where it was apparent that any conviction in the receiving country would amount to a "flagrant" denial of justice, which was not the position in the present case. On the other hand, a Contracting State was not required to establish whether proceedings conducted outside its territory satisfied each of the conditions laid down in Article 6. To rule otherwise would run counter to the current trend, encouraged by the Court itself, of strengthening international mutual assistance in the judicial field.

157. Under the relevant provisions of Tunisian law, a person convicted in his absence was entitled to have the proceedings reopened. The right to a reopening of the proceedings could be exercised in good time and in accordance with the requirements of Article 6. In particular, a person convicted in his absence who was living abroad could appeal within thirty days of the judgment *in absentia* being served. Where such service had not been effected, an appeal was always admissible and would stay execution of the sentence. Furthermore, the possibility of appealing against a conviction *in absentia* in Tunisia was confirmed by the declarations of the Director of International Cooperation at the Tunisian Ministry of Justice, which were reassuring on the point (see paragraph 40 above). In addition, the applicant had not adduced any evidence that in the light of the relevant rules of Tunisian law there had been shown to be substantial grounds for believing that his trial had been conducted in conditions contrary to the principles of fair trial.

158. Admittedly, in the States party to the Convention, trial before a military court might raise an issue under Article 6. However, in the case of an expulsion, an applicant had to prove that the denial of justice he feared would be "flagrant". Such proof had not been produced in the present case. In addition, in December 2003 Tunisia had amended its domestic provisions relating to terrorist crimes committed by civilians, with the result that military judges had been replaced by civilian judges and an investigating judge took part in the investigation.

159. Lastly, the Government argued that the case of Mr Loubiri, cited by the applicant, was not relevant, as an increase of the sentence on appeal was something that could occur even in those countries which were most scrupulously compliant with the Convention.

2. The Court's assessment

160. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

161. The applicant alleged that his expulsion to Tunisia would deprive his partner and his son of his presence and assistance. He relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

162. The Government rejected that argument.

A. Admissibility

163. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

164. The applicant observed that he had a family life in Italy which would be disrupted by enforcement of his expulsion: he had been living with Mrs V. since 1998; their child had been born the following year. At that time he had already requested a residence permit, which was not issued until 2001. When that permit expired he had tried unsuccessfully to regularise his situation in order to find work. The applicant's child attended school in Italy, which would not be possible in Tunisia, where the applicant himself was at risk of imprisonment or even death. Mrs V. had been out of work for about a year as she suffered from a serious form of ischaemia which frequently made it necessary for her to be taken into hospital and also prevented her from travelling to Tunisia. The applicant was therefore the family's sole means of financial support.

165. Any allegation concerning the applicant's dangerousness to society had been refuted by his acquittal at first instance on the charge of international terrorism. As matters stood, this was the only judicial decision given in the proceedings against him, since the appeal proceedings were still pending. No new evidence had been adduced by the Government.

166. Moreover, the authorities had many other means to keep an eye on the applicant, expulsion being a measure to be adopted only in extreme cases. In that connection, the applicant pointed out that, since 3 November 2006, he had to report three times a week to a police station in Milan and that he had been forbidden to leave Italian territory (see paragraph 43 above). He had always complied with these obligations and had thus been able to obtain the return of his driving licence, which had been withdrawn from him – illegally in his submission – by the vehicle licensing authority (*motorizzazione civile*).

(b) The Government

167. The Government submitted that account had to be taken of the following facts: (a) the applicant's family unit had been created at a time when his presence in Italy was unlawful, as he had had a son by an Italian woman in 1999, whereas the residence permit granted to him for family reasons had not been issued until 29 December 2001; (b) the child had not attended school for very long in Italy and had had no significant exposure to Italian culture (he was currently in the second year of primary school), so that he would be able to continue to attend school in Tunisia; (c) the applicant had never lived with Mrs V. and his son: they had lived in Arluno, until 7 October 2002, when they moved to Milan; the applicant had never lived in Arluno, had often travelled abroad, had been arrested on 9 October 2002 and had married another woman in a Muslim ceremony (see paragraph 57 above); (d) the unit of family life could be preserved outside Italian territory, given that neither the applicant nor Mrs V. were in work in Italy.

168. The interference in the applicant's family life had a legal basis in domestic law, namely Law no. 155 of 2005. In addition, account had to be taken of the negative influence which, because of his personality and the scale of the terrorist danger, the applicant represented for national security, and of the particular importance which should be attached to the prevention of serious crime and disorder. Any interference with the applicant's right to respect for his family life therefore pursued a legitimate aim and was necessary in a democratic society.

169. In addition, no disproportionate or excessive burden had been imposed on the applicant's family unit. In the context of crime prevention policy, the legislature had to enjoy broad latitude to rule both on the existence of a problem of public interest and on the choice of arrangements for the application of an individual measure. Organised crime of a terrorist nature had reached, in Italy and in Europe, very alarming proportions, to the extent that the rule of law was under threat. Administrative measures (such as deportation) were indispensable for effective action against the phenomenon. Deportation presupposed the existence of "sufficient evidence" that the person under suspicion was supporting or assisting a terrorist organisation. The Minister of the Interior could not rely on mere suspicions but had to establish the facts and assess them objectively. All the material in the file suggested that that assessment, in the present case, had been correct and not arbitrary. The evidence used in the administrative deportation proceedings was the evidence taken in the course of public and adversarial proceedings in the Milan Assize Court. During those criminal proceedings the applicant had had the opportunity, through his

lawyer, of raising objections and submitting the evidence he considered necessary to safeguard his interests.

2. The Court's assessment

170. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 7

171. The applicant submitted that his expulsion would be neither "necessary in the interests of public order" nor "grounded on reasons of national security". He alleged a violation of Article 1 of Protocol No. 7, which provides:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

172. The Government rejected that argument.

A. Admissibility

173. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

174. The applicant submitted that he was lawfully resident in Italian territory. He argued that the condition of "lawful residence" should be assessed by reference to the situation at the time of the deportation decision. When arrested he had a valid residence permit, which expired only because he was in prison. He had subsequently attempted to regularise his situation, but had been prevented from doing so on account of his internment in the temporary holding centre.

175. The applicant's situation could now be regularised, since the terrorism charges had not led to his conviction, he was cohabiting with his Italian partner and son and was able to work. However, any administrative step he might take was blocked by the fact that he had no document which could prove his nationality and could never obtain one from the Tunisian authorities (see paragraph 45 above).

176. The applicant submitted that he was being prevented from exercising the rights listed in paragraph 1 (a), (b) and (c) of Article 1 of Protocol No. 7, whereas his expulsion could not be regarded as "necessary in the interests of public order" or "grounded on reasons of national security". In that connection, he observed that the considerations of the Minister of the Interior were contradicted by the Milan Assize Court, which had acquitted him of international terrorism. In any event, the Government had not adduced any evidence of the existence of dangers to national security or public order, so that the decision to take him to a temporary holding centre with a view to his expulsion had been "unlawful".

(b) The Government

177. The Government observed that, according to the explanatory report accompanying Article 1 of Protocol No. 7, the word "lawfully" referred to the domestic legislation of the State concerned. It was therefore domestic legislation which should determine the conditions a person had to satisfy in order for his or her presence within the national territory to be considered "lawful". In particular, an alien whose admission and stay had been made subject to certain conditions, for example a fixed period, and who no longer complied with those conditions could not be regarded as being still "lawfully" present in the State's territory. Yet after 11 October

2002, a date which preceded the deportation order, the applicant no longer had a valid residence permit authorising his presence in Italy. He was therefore not "an alien lawfully resident in the territory" within the meaning of Article 1 of Protocol No. 7, which was accordingly not applicable.

178. The Government further observed that the deportation order had been issued in accordance with the rules established by the relevant legislation, which required a simple administrative decision. The law in question was accessible, its effects were foreseeable and it offered a degree of protection against arbitrary interference by the public authorities. The applicant had also had the benefit of "minimum procedural safeguards". He had been represented before the justice of the peace and the Regional Administrative Court by his lawyer, who had been able to submit reasons why he should not be deported. A deportation order had also been issued against the applicant when he was sentenced to four years and six months' imprisonment, and hence after adversarial judicial proceedings attended by all the safeguards required by the Convention.

179. In any event, the Government submitted that the applicant's deportation was necessary in the interests of national security and the prevention of disorder. They argued that these requirements were justified in the light of the information produced in open court during the criminal proceedings against the applicant and pointed out that the standard of proof required for the adoption of an administrative measure (a deportation order issued by the Minister of the Interior by virtue of Legislative decree no. 144 of 2005) was lower than that required to ground a criminal conviction. In the absence of manifestly arbitrary conclusions, the Court should endorse the national authorities' reconstruction of the facts.

2. The Court's assessment

180. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 1 of Protocol No. 7.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

181. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

182. The applicant requested in the first place 20,000 euros (EUR) for loss of income. He observed that the deportation order had caused him to fall into an irregular situation, that he had been detained unlawfully in the Milan temporary holding centre for three months and that this had prevented him from carrying on his occupation.

183. In respect of non-pecuniary damage, the applicant claimed EUR 50,000 and suspension and/or annulment of the deportation order.

184. The Government observed that the deportation had not been enforced, so that the applicant, an alien who had contravened the laws of the Italian State and had been lawfully detained after 9 October 2002, was not entitled to claim for any pecuniary damage or loss of income.

185. On the question of non-pecuniary damage, the Government submitted that there was no causal link between the conduct of the Italian authorities and the sufferings and inconvenience alleged by the applicant. In any event, the applicant had not indicated what criteria had been used for the calculation of the sum claimed.

186. The Court reiterates that it is able to make awards by way of the just satisfaction provided for in Article 41 where the loss or damage on which a claim is based has been caused by the violation found, but that the State is not required to make good damage not attributable to it (see *Perote Pellon v. Spain*, no. 45238/99, § 57, 25 July 2002).

187. In the present case, the Court has found that enforcement of the applicant's deportation to Tunisia would breach Article 3 of the Convention. On the other hand, it has not found any violations of the Convention on account of the deprivation of the applicant's liberty or the fact that his presence in Italy was unlawful. Consequently, it can see no causal link between the violation found in the present judgment and the pecuniary damage alleged by the applicant.

188. With regard to the non-pecuniary damage sustained by the applicant, the Court considers that the finding that his deportation, if carried out, would breach Article 3 of the Convention constitutes sufficient just satisfaction.

B. Costs and expenses

189. The applicant did not request reimbursement of the costs and expenses incurred during the domestic proceedings. He did, however, request reimbursement of his costs relating to the proceedings before the Court, which, according to a bill from his lawyer, amounted to EUR 18,179.57.

190. The Government considered that amount excessive.

191. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, § 49).

192. The Court considers the amount claimed for the costs and expenses relating to the proceedings before it excessive and decides to award EUR 8,000 under that head.

C. Default interest

193. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention;

3. *Holds* that it is not necessary to examine whether enforcement of the decision to deport the applicant to Tunisia would also be in breach of Articles 6 and 8 of the Convention and Article 1 of Protocol No. 7;

4. *Holds* that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*

   (a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 February 2008.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- concurring opinion of Judge Zupančič;

- concurring opinion of Judge Myjer, joined by Judge Zagrebelsky. (…)

4. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

a) ECJ C-133/06, European Parliament v. Council, 6 May 2008

JUDGMENT OF THE COURT (Grand Chamber)

6 May 2008 (*)

(Action for annulment – Common policy on asylum – Directive 2005/85/EC – Procedures in Member States for granting and withdrawing refugee status – Safe countries of origin – European safe third countries – Minimum common lists – Procedure for adopting or amending the minimum common lists – Article 67(1) and first indent of Article 67(5) EC – No power)

In Case C-133/06,

APPLICATION for annulment under the first paragraph of Article 230 EC, brought on 8 March 2006,

European Parliament, represented by H. Duintjer Tebbens, A. Caiola, A. Auersperger Matić and K. Bradley, acting as Agents,

applicant,

supported by:

Commission of the European Communities, represented by C. O'Reilly, P. Van Nuffel and J.-F. Pasquier, acting as Agents, with an address for service in Luxembourg,

intervener,

v

Council of the European Union, represented by M. Simm, M. Balta and G. Maganza, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

French Republic, represented by G. de Bergues and J.-C. Niollet, acting as Agents,

intervener,

THE COURT (Grand Chamber),

gives the following

Judgment

1 By its application, the European Parliament seeks, primarily, the annulment of Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13; 'the contested provisions') and, alternatively, the annulment of that directive in its entirety.

2 By order of the President of the Court of Justice of 25 July 2006, the Commission of the European Communities and the French Republic were granted leave to intervene in support of the forms of order sought by the Parliament and the Council of the European Union respectively.

Legal context

Relevant provisions of the EC Treaty

3 The first paragraph of Article 63 EC in Title IV of the Treaty, headed 'Visas, asylum, immigration and other policies related to free movement of persons', provides:

'The Council, acting in accordance with the procedure referred to in Article 67 [EC], shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum …, within the following areas:

…

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection;

…'

4 Article 67 EC, as amended by the Treaty of Nice, provides:

'1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

– the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;

– the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 [EC] and adapting the provisions relating to the powers of the Court of Justice.

…

5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251 [EC]:

– the measures provided for in Article 63(1) and (2)(a) [EC] provided that the Council has previously adopted, in accordance with paragraph 1 of this Article, Community legislation defining the common rules and basic principles governing these issues,

…'

Secondary legislation prior to Directive 2005/85

5 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18) were adopted on the basis of point 1(a) and (b) respectively of the first paragraph of Article 63 EC.

6 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) was adopted on the basis of points 1(c), 2(a) and 3(a) of the first paragraph of Article 63 EC.

7 Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (OJ 2004 L 396, p. 45) was adopted on the basis of the second indent of Article 67(2) EC.

8 Article 1(2) of that decision provides:

'As from 1 January 2005 the Council shall act in accordance with the procedure laid down in Article 251 [EC] when adopting measures referred to in Article 63(2)(b) and (3)(b) [EC].'

9 Recital 4 in the preamble to the decision points out that the decision does not affect the provisions of Article 67(5) EC.

Directive 2005/85

10 Directive 2005/85 was adopted on the basis, in particular, of point 1(d) of the first paragraph of Article 63 EC.

11 According to Article 1, the purpose of the directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.

12 Recitals 17 and 18 in the preamble to the directive state:

'(17) A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.

(18) Given the level of harmonisation achieved on the qualification of third country nationals and stateless persons as refugees, common criteria for designating third countries as safe countries of origin should be established.'

13 With regard to safe countries of origin, recital 19 in the preamble to Directive 2005/85 states:

'Where the Council has satisfied itself that those criteria are met in relation to a particular country of origin, and has consequently included it in the minimum common list of safe countries of origin to be adopted pursuant to this Directive, Member States should be obliged to consider applications of persons with the nationality of that country … on the basis of the rebuttable presumption of the safety of that country. In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should take any decisions on the establishment or amendment of the list, after consultation of the European Parliament.'

14 With respect to certain European third countries which observe particularly high human rights and refugee protection standards, recital 24 in the preamble to the directive is worded as follows:

'… Member States should be allowed to not carry out, or not to carry out full examination of asylum applications regarding applicants who enter their territory from such European third countries. Given the potential consequences for the applicant of a restricted or omitted examination, this application of the safe third country concept should be restricted to cases involving third countries with respect to which the Council has satisfied itself that the high standards for the safety of the third country concerned, as set out in this Directive, are fulfilled. The Council should take decisions in this matter after consultation of the European Parliament.'

15 Article 29(1) and (2) of the directive, headed 'Minimum common list of third countries regarded as safe countries of origin', provides:

'1. The Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin in accordance with Annex II.

2. The Council may, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, amend the minimum common list by adding or removing third countries, in accordance with Annex II. The Commission shall examine any request made by the Council or by a Member State to submit a proposal to amend the minimum common list.'

16 Annex II to Directive 2005/85, headed 'Designation of safe countries of origin for the purposes of Articles 29 and 30(1)', defines the criteria by which a country may be designated as a safe country of origin as follows:

'A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect of the non-refoulement principle according to the Geneva Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms.'

17 According to Article 36(1) to (3) of Directive 2005/85, headed 'The European safe third countries concept':

'1. Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that

the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.

2. A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

(b) it has in place an asylum procedure prescribed by law;

(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

(d) it has been so designated by the Council in accordance with paragraph 3.

3. The Council shall, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.'

18 The Council did not apply the contested provisions in the adoption of the two lists provided for by those provisions.

The application

19 In support of its application for annulment, the Parliament raises four pleas in law: infringement of the EC Treaty stemming from disregard of the first indent of Article 67(5) EC; the Council's lack of competence to enact the contested provisions; breach of the duty to state reasons for those provisions; and, finally, failure to comply with the obligation to cooperate in good faith.

20 The first two pleas should be examined together, since they are indissociable, as the Advocate General noted at point 11 of his Opinion.

The first two pleas, alleging an infringement of the first indent of Article 67(5) EC and the Council's lack of competence

Arguments of the parties

21 The Parliament submits that, in view of the Community legislation that was already adopted, namely Regulation No 343/2003 and Directives 2003/9 and 2004/83, the adoption of Directive 2005/85 constituted the final legislative stage in the adoption of common rules and basic principles the implementation of which was intended to enable the transition to be made to the procedure laid down in Article 251 EC ('the co-decision procedure'), in accordance with the requirements of the first indent of Article 67(5) EC.

22 Therefore, the subsequent adoption of the minimum common list of third countries regarded as safe countries of origin and the common list of European safe third countries (together: 'the lists of safe countries') should proceed in accordance with the co-decision procedure.

23 By the contested provisions, the Council therefore unlawfully made use, in an act of secondary legislation, of legal bases enabling it to adopt the lists of safe countries by way of a procedure requiring only the consultation of the Parliament.

24 According to the Parliament, by creating a secondary legal basis in this way, the Council 'reserved to itself a right to legislate'. However, nowhere does the Treaty provide for the Council to be able to establish new legal bases for the purposes of the adoption of secondary legislation outside the existing procedures for the adoption of legislative acts and implementing measures.

25 The Parliament takes the view that the possible existence of a Council practice of establishing secondary legal bases cannot serve as justification.

26 Referring to the judgment of the Court in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, the Parliament submits that, in the field of legislation, the Treaty applies and it is not possible to alter the procedures it lays down.

27 The Commission takes the view that the secondary legal bases contained in the contested provisions are unlawful.

28 The Community legislature does not have the option of choosing the manner in which it exercises its powers. The institutions may act only within the limits of the powers conferred upon them by the Treaties, which alone determine the procedures for the adoption of legislative acts.

29 According to the Commission, the contested provisions cannot be regarded as reservations of the right to exercise implementing power, available to the Council on the basis of the third indent of Article 202 EC.

30 The contested provisions constitute a twofold procedural abuse: first, in relation to the unanimity rule laid down in point 1(d) of the first paragraph of Article 63 EC at the time of the adoption of Directive 2005/85 and, second, in relation to the co-decision procedure which must replace that rule once Community legislation is adopted which defines the common rules and basic principles governing asylum policy.

31 The Council submits that, on the contrary, nothing in the EC Treaty precludes an act adopted in accordance with the procedure laid down by the applicable legal basis from creating a secondary legal basis for the purposes, inter alia, of the subsequent adoption of a legislative act in that area by means of a simplified decision-making procedure.

32 According to the Council, the use of secondary legal bases is an established legislative technique, which is illustrated in numerous Community acts. The only lesson to be drawn from the judgment in *United Kingdom* v *Council* is that a secondary legal basis cannot result in the procedure laid down by the Treaty becoming more cumbersome, which is not the case as regards the procedure introduced by Directive 2005/85.

33 The Council takes the view that the circumstances of the case called for recourse to be had to a secondary legal basis, and that the first indent of Article 67(5) EC did not preclude this.

34 The instruments constituted by the lists of safe countries fall within an area characterised both by great political sensitivity on the part of the Member States, and by the practical need to react quickly and effectively to changes in the situation of the third countries in question. In fact, those instruments cannot be used effectively unless they are adopted and subsequently amended by means of a procedure such as that introduced by the contested provisions.

35 The Council denies that the secondary legal bases contained in the contested provisions conflict with the co-decision procedure provided for in the first indent of Article 67(5) EC. That provision is applicable only on the twofold condition that the act to be adopted is founded on points 1 or 2(a) of the first paragraph of Article 63 EC and that the Council has previously adopted Community legislation defining the common rules and basic principles governing the issue.

36 With regard to the first of those conditions, the Council observes, in essence, that the lists of safe countries will not be adopted on the basis of Article 63 EC but will be founded on the contested provisions, which provide for a less cumbersome procedure than that used for the adoption of the basic act. The Council adds that, since the Treaty required only the consultation of the Parliament for the adoption of Directive 2005/85, it is hard to find fault with recourse to the contested provisions which provide for the same level of participation by the Parliament.

37 As far as the second condition is concerned, the Council takes the view that, by referring to 'Community legislation', the first indent of Article 67(5) EC does not require the common rules and basic principles to be laid down in a single legislative act and at a specific time. The transition to the co-decision procedure is linked to a substantive, rather than to a formal or temporal, criterion.

38 Since the conditions laid down for transition to the co-decision procedure have not been fulfilled, neither the Parliament's prerogatives nor the institutional balance have been undermined.

39 The French Republic submits that the adoption of the lists of safe countries forms part of Community legislation defining 'the common rules and basic principles' within the meaning of the first indent of Article 67(5) EC. Consequently, even if those lists are required to be adopted on the basis of the Treaty itself and not on the basis of the contested provisions, they should be adopted only after mere consultation of the Parliament.

40 With regard to the general question of the possibility of recourse to a secondary legal basis, the French Republic, like the Council, takes the view that there is nothing in the Treaty that precludes it.

41 Recourse to secondary legal bases is an established practice of the Community legislature. Admittedly, a mere practice cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the Community institutions. However, the case-law shows that the Court of Justice is not necessarily indifferent to the practices followed by those institutions (Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraphs 48 and 49).

42 Finally, as regards the substantive conditions for recourse to secondary legal bases, these are met in the present case. The contested provisions are of great political sensitivity and reflect the practical need to react quickly and effectively to changes in the situation of third countries.

Findings of the Court

43 By its first two pleas in law, the Parliament raises, in essence, the question whether the Council could lawfully provide in the contested provisions for the adoption and amendment of the lists of safe countries by a qualified majority on a proposal from the Commission and after consulting the Parliament.

44 It should be borne in mind that, under the second subparagraph of Article 7(1) EC, each institution is to act within the limits of the powers conferred upon it by the Treaty (see Case C-403/05 *Parliament* v *Commission* [2007] ECR I-0000, paragraph 49, and the case-law cited).

45 It must be observed, first, that, when adopting Directive 2005/85 in accordance with the arrangements laid down in Article 67(1) EC, the Council had the opportunity to apply the third indent of Article 202 EC in order to adopt measures not essential to the subject-matter to be regulated (see, to that effect, Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 36).

46 Thus, on the assumption that the lists of safe countries are non-essential and relate to a specific case, the Council could have decided to reserve the right to exercise implementing powers, provided that it stated in detail the grounds for its decision (see, to that effect, Case C-257/01 *Commission* v *Council*[2005] ECR I-345, paragraph 50).

47 The Council must properly explain, by reference to the nature and content of the basic instrument to be implemented, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power (*Commission* v *Council*, paragraph 51).

48 In the present case, the Council expressly referred, in recital 19 in the preamble to Directive 2005/85, to the political importance of the designation of safe countries of origin and, in recital 24, to the potential consequences for asylum applicants of the safe third country concept.

49 However, as the Advocate General stated at point 21 of his Opinion, the grounds set out in those recitals are conducive to justifying the consultation of the Parliament in respect of the establishment of the lists of safe countries and the amendments to be made to them, but not to justifying sufficiently a reservation of implementing powers which is specific to the Council.

50 In addition, in the present dispute – which concerns a directive the contested provisions of which reserve to the Council a power which is not limited in time – the Council has not advanced any argument as to why those provisions should be reclassified as provisions on the basis of which the Council has reserved the right to exercise directly specific implementing powers itself. On the contrary, the Council confirmed at the hearing that those provisions confer upon it a secondary legislative power.

51 In those circumstances, no possibility arises of a reclassification of the contested provisions to enable the view to be taken that the Council applied the third indent of Article 202 EC.

52 Second, it should be noted that, in the context of the application of Article 67 EC, the measures to be taken in the areas covered by points 1 and 2(a) of Article 63 EC are adopted in accordance with two separate procedures laid down in Article 67 EC: the procedure for unanimous adoption after consultation of the Parliament or the co-decision procedure.

53 The contested provisions introduce a procedure for the adoption of those measures by a qualified majority on a proposal from the Commission and after consultation of the Parliament; such a procedure differs from those laid down in Article 67 EC.

54 However, it has already been held that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves (see *United Kingdom* v *Council*, paragraph 38).

55 The Treaty alone may, in particular cases such as that provided for in the second indent of Article 67(2) EC, empower an institution to amend a decision-making procedure established by the Treaty.

56 To acknowledge that an institution can establish secondary legal bases, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaty.

57 It would also enable the institution concerned to undermine the principle of institutional balance which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraph 22).

58 The Council cannot reasonably claim that the adoption procedure laid down by the contested provisions does not conflict with the co-decision procedure on the ground that the lists of safe countries will not be adopted on the basis of Article 63 EC but on the basis of those

provisions, which provide for a less cumbersome procedure than that under which the basic act was adopted. Such an argument effectively accords provisions of secondary legislation primacy over primary legislation – in the present case, Article 67 EC, paragraphs (1) and (5) of which must be applied successively in compliance with the conditions laid down to that effect.

59 Nor can the adoption of secondary legal bases be justified on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a Community action.

60 Furthermore, the existence of an earlier practice of establishing secondary legal bases cannot reasonably be relied upon. Even on the assumption that there is such a practice, it cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the institutions (see, to that effect, *United Kingdom* v *Council*, paragraph 24, and Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 21).

61 It follows that, by including in Directive 2005/85 the secondary legal bases constituted by the contested provisions, the Council infringed Article 67 EC, thereby exceeding the powers conferred on it by the Treaty.

62 It must be added that, as regards the future adoption of the lists of safe countries and their amendment, the Council must proceed in compliance with the procedures established by the Treaty.

63 In that respect, in order to determine whether the adoption and amendment of the lists of safe countries through legislation or any decision to apply the third indent of Article 202 EC, in the form of a delegation or reservation of implementing powers, fall within paragraphs (1) or (5) of Article 67 EC, it is necessary to assess whether, with the adoption of Directive 2005/85, the Council has adopted Community legislation defining the common rules and basic principles governing the issues covered by points 1 and 2(a) of the first paragraph of Article 63 EC.

64 As regards procedures in Member States for granting or withdrawing refugee status, point 1(d) of the first paragraph of Article 63 EC merely provides for the adoption of 'minimum standards'.

65 As is apparent from paragraphs 10 to 17 of this judgment, Directive 2005/85 adopts detailed criteria enabling the lists of safe countries to be established subsequently.

66 Consequently it must be concluded that, by that legislative act, the Council adopted 'Community legislation defining the common rules and basic principles' within the meaning of the first indent of Article 67(5) EC, and therefore the co-decision procedure is applicable.

67 In the light of the foregoing, the first two pleas in law advanced by the Parliament in support of its application for annulment must be upheld and, accordingly, the contested provisions annulled.

The third and fourth pleas in law, alleging a breach of the duty to state reasons for the contested provisions and failure to comply with the obligation to cooperate in good faith

68 Since the first two pleas in law are well founded, there is no need to examine the third and fourth pleas in law upon which the Parliament relied in support of its application.

Costs

69 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament has applied for the Council to be ordered to pay the costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4), the interveners in this case are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Annuls Articles 29(1) and (2) and 36(3) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status;**

2. **Orders the Council of the European Union to pay the costs;**

3. **Orders the French Republic and the Commission of the European Communities to bear their own costs.**

b) CJEU C-69/10, Diouf, 28 July 2011

JUDGMENT OF THE COURT (Second Chamber)

28 July 2011 (*)

(Directive 2005/85/EC – Minimum standards on procedures in Member States for granting and withdrawing refugee status – 'Decision taken on [the] application for asylum' within the meaning of Article 39 of Directive 2005/85 – Application by a third country national for refugee status – Failure to provide reasons justifying the grant of international protection – Application rejected under an accelerated procedure – No remedy against the decision to deal with the application under an accelerated procedure – Right to effective judicial review)

In Case C-69/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Administratif (Luxembourg), made by decision of 3 February 2010, received at the Court on 5 February 2010, in the proceedings

Brahim Samba Diouf

v

Ministre du Travail, de l'Emploi et de l'Immigration,

THE COURT (Second Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

2 The reference was made in proceedings between Mr Samba Diouf, a Mauritanian national without a legal right of residence, and the Luxembourg Ministre du Travail, de l'Emploi et de l'Immigration (Minister for Labour, Employment and Immigration), concerning the rejection, under an accelerated procedure, of Mr Samba Diouf's application for refugee status in the absence of any reasons justifying the grant of international protection.

Legal context

European Union legislation

The Charter of Fundamental Rights of the European Union

3 Article 47 of the Charter of Fundamental Rights of the European Union, entitled 'Right to an effective remedy and to a fair trial', provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

....'

Directive 2005/85

4 Recital 11 in the preamble to Directive 2005/85 states:

'It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.'

5 The first sentence of recital 13 to that directive is worded as follows:

'In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention [of 28 July 1951 relating to the status of refugees ('the Geneva Convention')], every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure.'

6 Recital 27 to Directive 2005/85 states:

'It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.'

7 Article 23 of Directive 2005/85, entitled 'Examination procedure', provides:

'1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.

4. Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

...

(b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under [Council] Directive 2004/83/EC [of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12)]; or

(c) the application for asylum is considered to be unfounded:

(i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or

(ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1); or

(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision …

...'

8 Article 28 of Directive 2005/85, entitled 'Unfounded applications', is worded as follows:

'1. Without prejudice to Articles 19 and 20, Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Directive 2004/83/EC.

2. In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications for asylum in which any of the circumstances listed in Article 23(4)(a) and (c) to (o) apply, Member States may also consider an application as manifestly unfounded, where it is defined as such in the national legislation.'

9 Article 39 of Directive 2005/85, entitled 'The right to an effective remedy', is worded as follows:

'1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum, including a decision:

(i) to consider an application inadmissible pursuant to Article 25(2),

(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),

(iii) not to conduct an examination pursuant to Article 36;

(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;

(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);

(e) a decision to withdraw refugee status pursuant to Article 38.

2. Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.

3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;

(b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and

(c) the grounds for challenging a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).

4. Member States may lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

5. Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC, the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.

6. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.'

National legislation

10 The relevant legislation is the Law of 5 May 2006 on the right of asylum and complementary forms of protection (loi du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection; *Mémorial* A 2006, p. 1402), as amended by the law of 29 August 2008 (*Mémorial* A 2008, p. 2024, 'the Law of 5 May 2006').

11 Article 19 of the Law of 5 May 2006 provides:

'The Minister shall rule on the merits of the application for international protection by a reasoned decision which shall be communicated to the applicant in writing. Where the application is rejected, information on the right of action shall be expressly set out in the decision. The Minister shall ensure that the procedure is concluded as soon as possible, without prejudice to an adequate and complete examination. Where a decision cannot be taken within a six-month period, the applicant concerned shall receive, upon request, information relating to the period within which a decision is liable to be taken on his application. That information shall not oblige the Minister to take a decision upon the applicant's case within the period stated. A decision by the Minister rejecting the application shall constitute an order to leave the territory.

(2) Internal administrative appeals shall not interrupt the periods prescribed by this Article within which legal actions may be brought.

(3) A decision rejecting an application for international protection may be challenged by an action for reversal before the Tribunal Administratif (Administrative Court). An order to leave the territory may be challenged by an action for annulment before the Tribunal Administratif. The two actions must form the subject of a single originating application, being inadmissible if they are brought separately. The action must be brought within one month of notification. The time-limit for bringing an action and an action brought within the time-limit shall have suspensory effect. ...

(4) A decision of the Tribunal Administratif may be challenged by an appeal before the Cour Administrative (Higher Administrative Court). The appeal must be lodged within one month of notification by the registrar. The time-limit for lodging an appeal and an appeal lodged within the time-limit shall have suspensory effect. ....'

12 Article 20 of the Law of 5 May 2006 provides:

‘(1) The Minister may rule on the merits of the application for international protection under an accelerated procedure in the following circumstances:

...

(b) the applicant clearly does not qualify for the status conferred by international protection;

...

(d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity or nationality that could have had a negative impact on the decision;

...

(2) The Minister shall make his decision no later than two months from the day on which it is apparent that the applicant falls within one of the categories provided for in paragraph 1 above. The Minister shall give his ruling in the form of a reasoned decision which shall be communicated to the applicant in writing. Where the application is rejected, information on the right of action shall be expressly set out in the decision. A decision by the Minister rejecting the application shall constitute an order to leave the territory in accordance with the provisions of the Amended Law of 28 March 1972 ... .

(3) Internal administrative appeals shall not interrupt the periods prescribed by this Article within which legal actions may be brought.

(4) A decision rejecting an application for international protection which is taken under an accelerated procedure may be challenged by an action for reversal before the Tribunal Administratif. An order to leave the territory may be challenged by an action for annulment before the Tribunal Administratif. The two actions must form the subject of a single originating application, being inadmissible if they are brought separately. The action must be brought within 15 days of notification. The Tribunal Administratif shall give judgment within two months of the making of the application. … The time-limit for bringing an action and an action brought within the time-limit shall have suspensory effect. The decisions of the Tribunal Administratif shall not be open to appeal.

(5) A decision by the Minister to rule on the merits of the application for international protection under an accelerated procedure shall not be open to any appeal.’

13 The Law of 5 May 2006 was amended by the law of 19 May 2011 (*Mémorial* A 2011, p. 1618). Paragraph 5 of Article 20 of the first of those laws was repealed and paragraph 4 thereof was amended as follows:

‘A decision by the Minister to rule on the merits of the application for international protection under an accelerated procedure may be challenged by an action for annulment before the Tribunal Administratif. A decision rejecting an application for international protection which is taken under an accelerated procedure may be challenged by an action for reversal before the Tribunal Administratif. An order to leave the territory may be challenged by an action for annulment before the Tribunal Administratif. The three actions must form the subject of a single originating application, being inadmissible if they are brought separately. The action must be brought within 15 days of notification. The Tribunal Administratif shall give judgment within two months of the making of the application. … The time-limit for bringing an action and an action brought within the time-limit shall have suspensory effect. The decisions of the Tribunal Administratif shall not be open to appeal’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 19 August 2009, Mr Samba Diouf, a Mauritanian national, submitted to the competent department of the Luxembourg Ministry of Foreign Affairs and Immigration an application for international protection. On 22 September 2009, he was heard with regard to his situation and the reasons underlying the application.

15 Mr Samba Diouf stated that he had left Mauritania in order to flee from slavery and that he wished to settle in Europe in order to live in better conditions and start a family. He also expressed the fear that his former employer, from whom he had stolen EUR 3000 in order to get to Europe, would have him hunted down and killed.

16 The application for international protection submitted by Mr Samba Diouf was examined under an accelerated procedure and was rejected as unfounded by a decision of 18 November 2009 of the Luxembourg Minister for Labour, Employment and Immigration, sent to the applicant by registered mail on 20 November 2009.

17 By that decision, in the first place, Mr Samba Diouf was informed of the fact that a ruling on the merits of his application for international protection had been given under an accelerated procedure since he fell within two of the cases provided for in Article 20(1) of the Law of 5 May 2006, given that he clearly did not qualify for the status conferred by international protection

(Article 20(1)(b)) and that he had misled the authorities by presenting false information or documents (Article 20(1)(d)).

18 In the second place, by that decision, the Minister for Labour, Employment and Immigration rejected Mr Samba Diouf's application for international protection in the decision on the substance. In the third place, the Minister ordered Mr Samba Diouf to leave Luxembourg.

19 The reasons given for rejecting Mr Samba Diouf's application were, first, the fact that he had produced a forged passport, which had misled the authorities, and second, that the reasons that he had put forward were economic in nature and did not satisfy any of the substantive criteria giving grounds for international protection.

20 More specifically, it was held that the fear of reprisals from Mr Samba Diouf's former employer could not be regarded as fear of persecution for the purposes of the Geneva Convention, in the absence of any political, ethnic or religious background. It was also held that the fear of reprisals, which remained hypothetical, was not established. The other considerations mentioned by Mr Samba Diouf, namely that his coming to Europe was also motivated by the desire to marry and start a family and by the fact that working conditions were too hard in Mauritania, were regarded as clearly outside the scope of the Geneva Convention. Moreover, it was also stated that the new Mauritanian Government had passed a law against slavery, which had entered into force in February 2008 and under which slavery is punishable with a fine and a 10-year term of imprisonment.

21 Finally, it was also held that there were no sound and proven reasons which would give grounds for believing that Mr Samba Diouf ran a real risk of suffering the serious harm defined in Article 37 of the Law of 5 May 2006 and justifying the grant of subsidiary protection.

22 Mr Samba Diouf brought an action against the decision of the Minister for Labour, Employment and Immigration of 18 November 2009 before the Tribunal Administratif, seeking (i) annulment of that decision in so far as the Minister had thereby decided to rule on the merits of Mr Samba Diouf's application for international protection under the accelerated procedure, (ii) reversal or annulment of that decision, in so far as it refused to grant him international protection and (iii) annulment of the decision in so far as Mr Samba Diouf was thereby ordered to leave Luxembourg.

23 In its consideration of the admissibility of the action seeking annulment of the decision of the Minister for Labour, Employment and Immigration to rule on the merits of Mr Samba Diouf's application under an accelerated procedure, the Tribunal Administratif concluded that the application of Article 20(5) of the Law of 5 May 2006, which provides that such a decision is not open to any appeal, gave rise to questions concerning the interpretation of Article 39 of Directive 2005/85, with respect to the application of the general principle of the right to an effective remedy.

24 The Tribunal Administratif points out, in that regard, that the decision to rule on the merits of an application for asylum under an accelerated procedure is not without consequences for the applicant for asylum. First, according to that court, the effect of the decision to use the accelerated procedure – which, unlike the substantive decisions relating to refusal to grant international protection and to removal from the territory, is not amenable to appeal under Luxembourg law – is to reduce the time-limit for bringing an action from 1 month to 15 days. Second, the judicial remedies which usually entail two levels of jurisdiction are not available to the applicant when that procedure is used, legal proceedings being limited, according to the referring court, to a single level of jurisdiction.

25 The Tribunal Administratif also expresses a view on the line of argument put forward before it by the representative of the Luxembourg Government, according to which the lawfulness of the decision to rule on the merits of the application for international protection under an accelerated procedure is reviewed – through an indirect action – by the Tribunal Administratif in the course of its examination of an action for reversal brought against the final decision rejecting the application. That argument is based on a judgment of the Cour Administrative of 16 January 2007 (No 22095 C).

26 The Tribunal Administratif maintains that it cannot follow the abovementioned judgment of the Cour Administrative on that point, since a review of the decision to rule on the merits of an application for asylum under an accelerated procedure 'through the remedy available against the final decision', as suggested by the Cour Administrative, appears to it to be contrary to the intention of the legislature to exempt, by means of Article 20(5) of the Law of 5 May 2006, that decision from any judicial review.

27 It was in those circumstances that the Tribunal Administratif decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 39 of Directive 2005/85/EC to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the … Law [of 5 May 2006], pursuant to which an applicant for asylum does not have a right to appeal to a court

against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?

2. If the answer [to the first question] is in the negative, is the general principle of an effective remedy under Community law, prompted by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the … Law [of 5 May 2006], pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?'

Consideration of the questions referred

28 By these questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 39(1)(a) of Directive 2005/85, by virtue of which applicants must have the right to an effective remedy against decisions 'taken on their application for asylum', and, more generally, the general principle of the right to an effective remedy, must be interpreted as meaning that they preclude rules such as those at issue in the main proceedings, as a result of which no separate judicial remedy exists as against the decision of the competent national authority to examine an application for asylum under an accelerated procedure.

Preliminary observations

29 For the purpose of analysing this question, it is necessary, as a preliminary matter, to note that the procedures put in place by Directive 2005/85 are minimum standards and that the Member States have, in a number of respects, a margin of assessment with regard to the implementation of those provisions in the light of the particular features of national law.

30 Thus, the organisation of the processing of applications for asylum is, as stated in recital 11 to Directive 2005/85, left to the discretion of Member States, which may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards provided for by the directive, without prejudice, in the words of Article 23(2) of the directive, to an adequate and complete examination. Attention is also drawn, in recital 11, to the fact that it is in the interests of both Member States and applicants for asylum to decide as soon as possible on applications for asylum.

31 Article 23 of Directive 2005/85 gives Member States, inter alia, the option to use an accelerated procedure in the cases provided for in paragraphs 3 and 4, that is to say, where the application is likely to be well founded or where the applicant has special needs or on the basis of 16 specific grounds justifying the use of such a procedures. Those grounds include, in particular, (i) applications in respect of which all the indications are that the application is unfounded, since clear and obvious factors give the authorities grounds for believing that the applicant will not be entitled to international protection, and (ii) fraudulent applications or applications made in bad faith.

32 In that regard, points (b) and (d) of Article 23(4) of Directive 2005/85 mention, inter alia, situations in which the applicant either clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83 or else has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision.

33 Directive 2005/85 does not contain a definition of the concept of accelerated procedure. However, Article 23(4) of the directive makes the accelerated processing of certain applications for asylum subject to compliance with the basic principles and guarantees referred to in Chapter II thereof. That Chapter contains a series of provisions seeking to ensure that there is effective access to asylum procedures by requiring Member States to afford applicants for asylum sufficient guarantees for them to be able to pursue their cases throughout all stages of the procedure.

34 As stated in recital 8 in its preamble, Directive 2005/85 respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Specifically, decisions taken on an application for asylum and on the withdrawal of refugee status are, according to recital 27 to the directive, subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU.

35 The fundamental principle of the right to an effective remedy forms the subject-matter of Article 39 of Directive 2005/85. Article 39 requires Member States to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against the decisions listed in paragraph 1 of the article.

36 Under Article 39(1)(a) of Directive 2005/85, Member States must ensure that applicants for asylum have the right to an effective remedy against a decision taken on their application for asylum, including a decision to consider an application inadmissible, a decision taken at the border or in the transit zones and a decision not to conduct an examination of the application,

owing to the fact that the competent authority has established that the applicant for asylum is seeking to enter, or has entered, illegally into its territory from a safe third country.

The concept of a decision taken on an application for asylum, within the meaning of Article 39(1)(a) of Directive 2005/85

37 The referring court asks, in the first place, whether Article 39(1)(a) of Directive 2005/85 must be interpreted as encompassing a decision of the competent authority to examine an application for international protection under an accelerated procedure.

38 The applicant in the main proceedings submits that the deliberately imprecise wording of Article 39(1)(a) of Directive 2005/85 supports the conclusion that any decision relating to the application for asylum is covered by that provision and that Member States must provide for a right of action against the decision of a national authority to examine an application under an accelerated procedure.

39 The Governments that have submitted observations and the Commission maintain, on the contrary, that only final decisions resulting in the refusal or withdrawal of refugee status are covered by that provision. In their submission, the subject of the effective remedy required by Article 39(1)(a) of Directive 2005/85 can be nothing other than the final decision on the application for protection and not the decision by which the national authority decides to examine the application under an accelerated procedure, which is a decision preparatory to the final decision or a decision as to how the procedure should be organised.

40 It is therefore appropriate to ascertain whether a decision to examine an application for asylum under an accelerated procedure constitutes a decision 'taken on [the] application for asylum', against which the applicant has the right to an effective remedy before a court or tribunal, pursuant to Article 39(1)(a) of Directive 2005/85.

41 In that regard, it is clear from the wording of Article 39(1)(a) of Directive 2005/85 and, in particular, from the non-exhaustive list of decisions contained therein, that the concept of a 'decision taken on [the] application for asylum' covers a series of decisions which, because they entail rejection of an application for asylum or are taken at the border, amount to a final decision rejecting the application on the substance. The same is true of the other decisions which, under Article 39(1)(b) to (e) of Directive 2005/85, are expressly made subject to the right to an effective judicial remedy.

42 Accordingly, the decisions against which an applicant for asylum must have a remedy under Article 39(1) of Directive 2005/85 are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance.

43 It follows that decisions that are preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure are not covered by that provision.

44 Moreover, as the Advocate General has stated in points 53 and 54 of his Opinion, if the wording of Article 39 of Directive 2005/85 were interpreted as meaning that 'a decision taken on [the] application' referred to any decision given in relation to an application for asylum and as also referring to decisions in preparation for the final decision on the application for asylum, or decisions pertaining to the organisation of the procedure, that would not be consistent with the interest in the expediency of procedures relating to applications for asylum. That interest in a procedure in that domain being, in accordance with Article 23(2) of Directive 2005/85, concluded as soon as possible, without prejudice to an adequate and complete examination, is, as is clear from recital 11 to the directive, common to both Member States and applicants for asylum.

45 Consequently, Article 39(1) of Directive 2005/85 must be interpreted as not requiring national law to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure. That provision does not therefore preclude, in principle, national rules such as those set out in Article 20(5) of the Law of 5 May 2006.

The compatibility of rules such as those at issue in the main proceedings with the right to an effective judicial remedy

46 Article 39(2) of Directive 2005/85 leaves it to Member States to decide on the time-limits and other necessary rules for implementing the right to an effective remedy, provided for in Article 39(1). As is recalled in recital 27 to the directive, the effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.

47 Since, in the case before the referring court, the grounds relied on by the competent authority in order to use an accelerated procedure are the same as, or broadly tally with, those which led to the substantive decision refusing refugee status, the referring court asks, in the second place, whether the fact that an applicant for asylum is not entitled to appeal against the decision of the competent administrative authority to examine his application under an

accelerated procedure infringes the right to an effective remedy inasmuch as that applicant for asylum is not in a position to challenge the substantive decision refusing him refugee status.

48 The question referred thus concerns the right of an applicant for asylum to an effective remedy before a court or tribunal in accordance with Article 39 of Directive 2005/85 and, in the context of European Union ('EU') law, with the principle of effective judicial protection.

49 That principle is a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union (see Case C-279/09 *DEB* [2010] ECR I-0000, paragraphs 30 and 31, and the order in Case C-457/09 *Chartry* [2011] ECR I-0000, paragraph 25).

50 It is therefore appropriate to determine whether the system put in place by the national rules at issue in the main proceedings observes the principle of effective judicial protection and, in particular, whether the fact that there is no appeal against the decision to examine the application for asylum under an accelerated procedure denies the applicant for asylum his right to an effective remedy.

51 The Law of 5 May 2006 provides, in Article 20(4), for the right to bring (i) an action for reversal before the Tribunal Administratif against a decision rejecting the application for international protection taken by the Minister for Labour, Employment and Immigration in an accelerated procedure, and (ii) an action for annulment against an order to leave the territory.

52 According to the applicant in the main proceedings, Article 20(5) of the Law of 5 May 2006, which provides that the decision of the Minister to rule on the merits of the application for international protection under an accelerated procedure may not be challenged, precludes any judicial review of the said decision, whether by way of a separate action or in the context of the action on the merits against the final decision relating to the grant of international protection. It is claimed that the fact that it is impossible to bring an action prevents the applicant from having access to an effective remedy against the final decision on the substance of his application for asylum, since his action on the substance would have no chance of succeeding in those circumstances.

53 The Governments that have submitted observations and the Commission maintain that the right to an effective judicial remedy does not preclude rules such as those at issue in the main proceedings, drawing attention to the fact that, in the examination of the final decision, it must be possible for the legal basis of any preparatory decision to be the subject of judicial review. The Luxembourg Government maintains, in that regard, that an effective legal remedy exists by virtue of the action that may be brought against the final decision, as the Cour Administrative acknowledged in its judgment of 16 January 2007 (No 22095C), and as is confirmed by the hitherto settled case-law of the Tribunal Administratif.

54 It is appropriate, in that regard, to recall that, in Case C-13/01 *Safalero* [2003] ECR I-8679, paragraphs 54 to 56, the Court held that the principle of effective judicial protection of the rights which the EU legal order confers on individuals is to be construed as not precluding national legislation under which an individual cannot bring court proceedings to challenge a decision taken by the public authorities, where there is available to that individual a legal remedy which ensures respect for the rights conferred on him by EU law and which enables him to obtain a judicial decision finding the provision in question to be incompatible with EU law.

55 The decision relating to the procedure to be applied for the examination of the application for asylum, viewed separately and independently from the final decision which grants or rejects the application, is a measure preparatory to the final decision on the application.

56 Accordingly, the absence of a remedy at that stage of the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application.

57 As regards judicial review within the framework of a substantive action against the decision rejecting the application for international protection, the effectiveness of that action would not be guaranteed if – because of the impossibility of bringing an appeal under Article 20(5) of the Law of 5 May 2006 – the reasons which led the Minister for Labour, Employment and Immigration to examine the merits of the application under an accelerated procedure could not be the subject of judicial review. In a situation such as that at issue in the main proceedings, the reasons relied on by that Minister in order to use the accelerated procedure are in fact the same as those which led to that application being rejected. Such a situation would render review of the legality of the decision impossible, as regards both the facts and the law (see, by analogy, Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 60 to 62).

58 What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed

by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum. It would not be compatible with EU law if national rules such as those deriving from Article 20(5) of the Law of 5 May 2006 were to be construed as precluding all judicial review of the reasons which led the competent administrative authority to examine the application for asylum under an accelerated procedure.

59 In that regard, it should be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct. Indeed, only the national courts are competent to decide upon the interpretation of domestic law (see, to that effect, Joined Cases C-378/07 to 380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 48).

60 However, in that context, attention should also be drawn to the requirement that national law be interpreted in conformity with EU law, which permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them (see, inter alia, Case C-268/06 *Impac*t [2008] ECR I-2483, paragraph 99). The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see *Impact*, paragraph 101 and the case-law cited).

61 The objective of Directive 2005/85 is to establish a common system of safeguards serving to ensure that the Geneva Convention and the fundamental rights are fully complied with. The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons. It is also within the framework of that remedy that the national court hearing the case must establish whether the decision to examine an application for asylum under an accelerated procedure was taken in compliance with the procedures and basic guarantees laid down in Chapter II of Directive 2005/85, as provided for in Article 23(4) of the directive.

62 With regard to the time limits for bringing proceedings and the possibility of two levels of jurisdiction, the referring court points to the differences between the accelerated procedure and the ordinary procedure for dealing with an application for asylum. In particular, it draws attention to the fact that the action against the final decision must be brought within a period of 15 days from notification of that decision, as opposed to within 1 month in the case of the ordinary procedure, and that the decisions of the Tribunal Administratif taken in relation to an accelerated procedure are not open to appeal.

63 The Governments that have submitted observations and the Commission maintain that a single court action satisfies the minimum required by the principle that effective judicial protection should be guaranteed and submit that a 15-day time-limit, in this instance, does not amount to an infringement of that principle, either from the point of view of the case-law of the European Court of Human Rights or that of the Court of Justice.

64 It should be determined whether EU law precludes national rules such as those at issue in the main proceedings in so far as the selection of an accelerated procedure instead of the ordinary procedure entails differences the effect of which is, in essence, that a less favourable treatment is reserved for the applicant for asylum as regards the right to an effective remedy, since the applicant has only 15 days within which to bring an action and does not have the benefit of two levels of jurisdiction.

65 In that regard, it must be stated at the outset that the differences that exist, in the national rules, between the accelerated procedure and the ordinary procedure, the effect of which is that thetime-limit for bringing an action is shortened and that there is only one level of jurisdiction, are connected with the nature of the procedure put in place. The provisions at issue in the main proceedings are intended to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently.

66 As regards the fact that the time-limit for bringing an action is 15 days in the case of an accelerated procedure, whilst it is 1 month in the case of a decision adopted under the ordinary procedure, the important point, as the Advocate General has stated in point 63 of his Opinion, is that the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action.

67 With regard to abbreviated procedures, a 15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved.

68 It is, however, for the national court to determine – should that time-limit prove, in a given situation, to be insufficient in view of the circumstances – whether that element is such as to justify, on its own, upholding the action brought indirectly against the decision to examine the application for asylum under an accelerated procedure, so that, in upholding the action, the national court would order that the application be examined under the ordinary procedure.

69 As regards the fact that the applicant for asylum has the benefit of two levels of jurisdiction only in relation to a decision adopted under the ordinary procedure, Directive 2005/85 does not require there to be two levels of jurisdiction. All that matters is that there should be a remedy before a judicial body, as is guaranteed by Article 39 of Directive 2005/85. The principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction.

70 The answer to the questions referred is therefore that, on a proper construction, Article 39 of Directive 2005/85 and the principle of effective judicial protection do not preclude national rules such as those at issue in the main proceedings, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application – a matter which falls to be determined by the referring court.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

On a proper construction, Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and the principle of effective judicial protection, do not preclude national rules such as those at issue in the main proceedings, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application – a matter which falls to be determined by the referring court.

V. Irregular Migration, Detention and Return

A. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

B. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals

C. Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air

D. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

1. ECJ C-357/09 PPU, Kadzoef, 30 November 2009

JUDGMENT OF THE COURT (Grand Chamber)

30 November 2009 (*)

(Visas, asylum, immigration and other policies related to free movement of persons – Directive 2008/115/EC – Return of illegally staying third-country nationals – Article 15(4) to (6) – Period of detention – Taking into account the period during which the execution of a removal decision was suspended – Concept of 'reasonable prospect of removal')

In Case C-357/09 PPU,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 10 August 2009, received at the Court on 7 September 2009, in the proceedings concerning

Said Shamilovich Kadzoev (Huchbarov),

THE COURT (Grand Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15(4) to (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The reference was made in the course of administrative proceedings brought on the initiative of the director of the Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti (Directorate for Migration at the Ministry of the Interior) requesting the Administrativen sad

Sofia-grad (Sofia City Administrative Court) to rule of its own motion on the continued detention of Mr Kadzoev (Huchbarov) at that directorate's special detention facility for foreign nationals ('the detention centre') in Busmantsi in the district of Sofia.

Legal context

Community legislation

3 Directive 2008/115 was adopted on the basis in particular of Article 63(3)(b) EC. According to recital 9 in the preamble to the directive:

'In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [OJ 2005 L 326, p. 13], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.'

4 Article 15 of Directive 2008/115, which forms part of the chapter on detention for the purpose of removal, reads as follows:

'1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.'

5 Under Article 20 of Directive 2008/115, Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, with the exception of Article 13(4), by 24 December 2010.

6 In accordance with Article 22 of the directive, it entered into force on 13 January 2009.

National legislation

7 Directive 2008/115 was transposed into Bulgarian law by the Law on foreign nationals in the Republic of Bulgaria (DV No 153 of 1998), as amended on 15 May 2009 (DV No 36 of 2009) ('the Law on foreign nationals').

8 According to the referring court, Article 15(4) of the directive has, however, not yet been transposed into Bulgarian law.

9 Under Article 44(6) of the Law on foreign nationals, where a coercive administrative measure cannot be applied to a foreign national because his identity has not been established or because he is likely to go into hiding, the body which adopted the measure may order the foreign national to be placed in a detention centre for foreign nationals in order to enable his deportation from the Republic of Bulgaria or expulsion to be arranged.

10 Before the transposition of Directive 2008/115, detention in such a centre was not subject to any time-limit.

11 Now, under Article 44(8) of the Law on foreign nationals, '[t]he detention shall last as long as the circumstances set out in paragraph 6 above pertain but may not exceed six months. Exceptionally, where the person refuses to cooperate with the competent authorities, where there is a delay in obtaining the documents essential for deportation or expulsion, or where the person constitutes a threat to national security or public order, the period of detention may be extended to 12 months'.

12 Article 46a(3) to (5) of the Law on foreign nationals provide:

'(3) Every six months the head of the detention centre for foreign nationals shall present a list of the foreign nationals who have been detained for more than six months owing to impediments to their removal from Bulgarian territory. The list is to be sent to the administrative court of the place where the detention centre is situated.

(4) At the end of each period of six months' detention in a detention centre, the court deliberating in private shall of its own motion determine whether the period of detention is to be extended, replaced, or terminated. No appeal shall lie against the court's decision.

(5) Where the court annuls the contested detention order or orders the foreign national to be released, the latter shall be immediately released from the detention centre.'

The main proceedings and the reference for a preliminary ruling

13 On 21 October 2006 a person was arrested by Bulgarian law enforcement officials near the border with Turkey. He had no identity documents and said that his name was Said Shamilovich Huchbarov, born on 11 February 1979 in Grozny (Chechnya). He stated that he did not wish the Russian consulate to be informed of his arrest.

14 By decree of 22 October 2006 of the competent police department, a coercive administrative measure of deportation was imposed on him.

15 He was placed in the detention centre on 3 November 2006, to be detained until it was possible to execute the decree, that is, until documents were obtained enabling him to travel abroad and sufficient funds guaranteed to purchase a ticket to Chechnya. The decree became enforceable on 17 April 2008, following judicial review proceedings.

16 On 14 December 2006 he declared to the authorities of the detention centre that his real name was not Huchbarov but Kadzoev.

17 In the course of two administrative proceedings before the Administrativen sad Sofia-grad, a birth certificate was produced showing that Mr Kadzoev was born on 11 February 1979 in Moscow (former Soviet Union) of a Chechen father, Shamil Kadzoev, and a Georgian mother, Loli Elihvari. However, a temporary identity card for a national of the Chechen Republic of Ichkeria, valid until 3 February 2001, issued in the name of Said Shamilovich Kadzoev, born on 11 February 1979 in Grozny, was also produced. The person concerned nevertheless continued to present himself to the authorities under the names of either Kadzoev or Huchbarov.

18 In the period from January 2007 to April 2008, there was an exchange of correspondence between the Bulgarian and Russian authorities. Contrary to the view of the Bulgarian authorities, the Russian authorities claimed that the temporary identity card in the name of Said Shamilovich Kadzoev came from persons and an authority unknown to the Russian Federation, and could not therefore be regarded as a document proving the person's Russian nationality.

19 On 31 May 2007, while he was detained in the detention centre, Mr Kadzoev applied for refugee status. The action he brought against the refusal of the Bulgarian administrative authorities to grant that application was dismissed by judgment of the Administrativen sad Sofia-grad of 9 October 2007. On 21 March 2008 he made a second application for asylum, but withdrew it on 2 April 2008. On 24 March 2009 he made a third application for asylum. By decision of 10 July 2009, the Administrativen sad Sofia-grad dismissed his action and refused him asylum. No appeal lies against that decision.

20 On 20 June 2008 Mr Kadzoev's lawyer applied for the detention to be replaced by a less severe measure, namely the obligation for Mr Kadzoev to sign periodically a register kept by the police authorities at his place of residence. As the competent authorities considered that he had no actual address in Bulgaria, they rejected the application on the ground that the necessary conditions were not satisfied.

21 On 22 October 2008 a similar application was made, which was likewise rejected.

22 Following an administrative procedure brought at the request of Mr Kadzoev before the Commission for Protection against Discrimination, which gave rise to proceedings in the Varhoven administrativen sad (Supreme Administrative Court), that court, in agreement with the commission, accepted in its judgment of 12 March 2009 that it was not possible to establish with certainty the identity and nationality of Mr Kadzoev, so that it considered him to be a stateless person.

23 According to the order for reference, the help centre for survivors of torture, the office of the United Nations High Commissioner for Refugees and Amnesty International find it credible that Mr Kadzoev was the victim of torture and inhuman and degrading treatment in his country of origin.

24 Despite the efforts of the Bulgarian authorities, several non-governmental organisations and Mr Kadzoev himself to find a safe third country which could receive him, no agreement was reached, and he has not as yet obtained any travel documents. Thus the Republic of Austria and Georgia, to which the Bulgarian authorities applied, refused to accept Mr Kadzoev. The Republic of Turkey, to which the Bulgarian authorities also applied, did not reply.

25 The Administrativen sad Sofia-grad states that Mr Kadzoev is still detained in the detention centre.

26 The main proceedings were commenced by an administrative document filed by the director of the Directorate for Migration at the Ministry of the Interior, asking the Administrativen sad Sofia-grad to rule of its own motion, pursuant to Article 46a(3) of the Law on foreign nationals, on the continued detention of Mr Kadzoev.

27 That court states that, before the Law on foreign nationals in the Republic of Bulgaria was amended for the purpose of transposing Directive 2008/115, the duration of detention in the detention centre was not limited to any period. It points out that there are no transitional provisions governing situations in which decisions were taken before that amendment. The applicability of the new rules deriving from the directive to periods and the grounds for extending them is therefore a matter on which interpretation should be sought, especially as, in the case at issue in the main proceedings, the maximum duration of detention laid down by the directive had already been exceeded before the directive was adopted.

28 Moreover, there is no express provision stating whether in a case such as the present one the periods referred to in Article 15(5) and (6) of Directive 2008/115 are to be understood as including the period during which the foreign national was detained when there was a legal prohibition on executing an administrative measure of 'deportation' on the ground that a procedure for recognition of humanitarian and refugee status had been initiated by Mr Kadzoev.

29 Finally, the referring court indicates that, if there is no 'reasonable prospect of removal' within the meaning of Article 15(4) of Directive 2008/115, the question arises whether the immediate release of Mr Kadzoev should be ordered in accordance with that provision.

30 In those circumstances, the Administrativen sad Sofia-grad decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that:

(a) where the national law of the Member State did not provide for a maximum period of detention or grounds for extending such detention before the transposition of the requirements of that directive and, on transposition of the directive, no provision was made for conferring retroactive effect on the new provisions, the requirements of the directive only apply and cause the period to start to run from their transposition into the national law of the Member State?

(b) within the periods laid down for detention in a specialised facility with a view to removal within the meaning of the directive, no account is to be taken of the period during which the execution of a decision of removal from the Member State under an express provision was suspended owing to a pending request for asylum by a third-country national, where during that procedure he continued to remain in that specialised detention facility, if the national law of the Member State so permits?

2. Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that within the periods laid down for detention in a specialised facility with a view to removal within the meaning of that directive no account is to be taken of the period during which execution of a decision of removal from the Member State was suspended under an express provision on the

ground that an appeal against that decision is pending, even though during the period of that procedure the third-country national has continued to stay in that specialised detention facility, where he did not have valid identity documents and there is therefore some doubt as to his identity or where he does not have any means of supporting himself or where he has demonstrated aggressive conduct?

3. Must Article 15(4) of Directive 2008/115 … be interpreted as meaning that removal is not reasonably possible where:

(a) at the time when a judicial review of the detention is conducted, the State of which the person is a national has refused to issue him with a travel document for his return and until then there was no agreement with a third country in order to secure the person's entry there even though the administrative bodies of the Member State are continuing to make endeavours to that end?

(b) at the time when a judicial review of the detention is conducted there was an agreement for readmission between the European Union and the State of which the person is a national, but, owing to the existence of new evidence, namely the person's birth certificate, the Member State did not refer to the provisions of that agreement, if the person concerned does not wish to return?

(c) the possibilities of extending the detention periods provided for in Article 15(6) of the directive have been exhausted in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of his detention is conducted, regard being had to Article 15(6)(b) of the directive?

4. Must Article 15(4) and (6) of Directive 2008/115 … be interpreted as meaning that if at the time when the detention with a view to removal of the third-country national is reviewed there is found to be no reasonable ground for removing him and the grounds for extending his detention have been exhausted, in such a case:

(a) it is none the less not appropriate to order his immediate release if the following conditions are all met: the person concerned does not have valid identity documents, whatever the duration of their validity, with the result that there is a doubt as to his identity, he is aggressive in his conduct, he has no means of supporting himself and there is no third person who has undertaken to provide for his subsistence?

(b) with a view to the decision on release it must be assessed whether, under the provisions of the national law of the Member State, the third-country national has the resources necessary to stay in the Member State as well as an address at which he may reside?'

The urgent procedure

31 The Administrativen sad Sofia-grad asked for the reference for a preliminary ruling to be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure.

32 The referring court justified its request by stating that the case raises the question whether Mr Kadzoev should be kept in detention in the detention centre or released. In view of his situation, the court stated that the proceedings should not be suspended for a prolonged period.

33 The Second Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under an urgent procedure, and to remit the case to the Court for it to be assigned to the Grand Chamber.

The questions referred for a preliminary ruling

Question 1(a)

34 By Question 1(a) the referring court essentially asks whether Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include also the period of detention completed before the rules in the directive become applicable.

35 It must be observed that Article 15(5) and (6) of Directive 2008/115 fix the maximum period of detention for the purpose of removal.

36 If the period of detention for the purpose of removal completed before the rules in Directive 2008/115 become applicable were not taken into account for calculating the maximum period of detention, persons in a situation such as that of Mr Kadzoev could be detained for longer than the maximum periods mentioned in Article 15(5) and (6) of that directive.

37 Such a situation would not be consistent with the objective of those provisions of Directive 2008/115, namely to guarantee in any event that detention for the purpose of removal does not exceed 18 months.

38 Moreover, Article 15(5) and (6) of Directive 2008/115 apply immediately to the future consequences of a situation that arose when the previous rules were in force.

39 The answer to Question 1(a) is therefore that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.

Question 1(b)

40 By Question 1(b) the referring court seeks to know whether, when calculating the period of detention for the purpose of removal under Article 15(5) and (6) of Directive 2008/115, the period must be included during which the execution of the removal decision was suspended because of the examination of an application for asylum by a third-country national, where, during the procedure relating to that application, he has remained in the detention centre.

41 It should be recalled that recital 9 in the preamble to Directive 2008/115 states that '[i]n accordance with … Directive 2005/85 … a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force'.

42 In accordance with Article 7(1) and (3) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18), asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State, but when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

43 Article 21 of Directive 2003/9 provides that Member States are to ensure that negative decisions relating to the granting of benefits under that directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance, the possibility of an appeal or a review before a judicial body must be granted.

44 Under Article 18(1) of Directive 2005/85, Member States must not hold a person in detention for the sole reason that he or she is an applicant for asylum and, under Article 18(2), where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

45 Detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules.

46 It is for the national court to determine whether Mr Kadzoev's stay in the detention centre during the period in which he was an asylum seeker complied with the conditions laid down by the provisions of Community and national law concerning asylum seekers.

47 Should it prove to be the case that no decision was taken on Mr Kadzoev's placement in the detention centre in the context of the procedures opened following his applications for asylum, referred to in paragraph 19 above, so that his detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of Directive 2008/115, Mr Kadzoev's period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in Article 15(5) and (6) of Directive 2008/115.

48 Consequently, the answer to Question 1(b) is that a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115.

Question 2

49 By this question the referring court asks essentially whether Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.

50 It must be observed that Article 13(1) and (2) of Directive 2008/115 provide in particular that the third-country national concerned is to be afforded an effective remedy to appeal against or seek review of decisions related to return before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence. That authority or body must have the power to review decisions

related to return, including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

51 Neither Article 15(5) and (6) of Directive 2008/115 nor any other provision of that directive permits the view that periods of detention for the purpose of removal should not be included in the maximum duration of detention defined in Article 15(5) and (6) because of the suspension of execution of the removal decision.

52 In particular, the suspension of execution of the removal decision because of a procedure for judicial review of that decision is not one of the grounds for extending the period of detention laid down in Article 15(6) of Directive 2008/115.

53 The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must therefore be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115.

54 If it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States.

55 This conclusion is not called into question by the judgment in Case C-19/08 *Petrosian* [2009] ECR I-0000 relied on by the Bulgarian Government. In that case, which concerned the interpretation of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), the Court held that where, in the context of the procedure for transfer of an asylum seeker, the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer laid down in Article 20(1)(d) of that regulation begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

56 That interpretation of Article 20(1)(d) of Regulation No 343/2003 cannot be transposed to the context of the interpretation of Article 15(5) and (6) of Directive 2008/115. While the period at issue in the *Petrosian* case determines the time available to the requesting Member State for implementing the transfer of an asylum seeker to the Member State which is obliged to readmit him, the maximum periods laid down in Article 15(5) and (6) of Directive 2008/115 serve the purpose of limiting the deprivation of a person's liberty. Moreover, the latter periods set a limit to the duration of detention for the purpose of removal, not to the implementation of the removal procedure as such.

57 Consequently, the answer to Question 2 is that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.

Question 3

58 By this question the referring court seeks clarification, in the light of the facts of the case in the main proceedings, of the meaning of Article 15(4) of Directive 2008/115, in particular of the concept of a 'reasonable prospect of removal'.

Question 3(c)

59 By Question 3(c) the referring court asks whether Article 15(4) of Directive 2008/115 is to be interpreted as meaning that there is no reasonable prospect of removal where the possibilities of extending the periods of detention provided for in Article 15(6) have been exhausted, in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of the detention of the person concerned is conducted.

60 It is clear that, where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115 has been reached, the question whether there is no longer a 'reasonable prospect of removal' within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately.

61 Article 15(4) of Directive 2008/115 can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired.

62 Consequently, the answer to Question 3(c) is that Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.

Questions 3(a) and (b)

63 As regards Questions 3(a) and (b), it should be pointed out that, under Article 15(4) of Directive 2008/115, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.

64 As is apparent from Article 15(1) and (5) of Directive 2008/115, the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal.

65 It must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive.

66 Thus a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

67 Consequently, the answer to Questions 3(a) and (b) is that Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

Question 4

68 By this question the referring court asks essentially whether Article 15(4) and (6) of Directive 2008/115 allow the person concerned not to be released immediately, even though the maximum period of detention provided for by that directive has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

69 It must be pointed out that, as is apparent in particular from paragraphs 37, 54 and 61 above, Article 15(6) of Directive 2008/115 in no case authorises the maximum period defined in that provision to be exceeded.

70 The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive.

71 Consequently, the answer to Question 4 is that Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 15(5) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.**

2. **A period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning**

asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115.

3. **Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.**

4. **Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.**

5. **Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.**

6. **Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.**

2. CJEU C-61/11 PPU, El Dridi, 28 April 2011

JUDGMENT OF THE COURT (First Chamber)

28 April 2011 (*)

(Area of freedom, security and justice – Directive 2008/115/EC – Return of illegally staying third-country nationals – Articles 15 and 16 – National legislation providing for a prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of a Member State – Compatibility)

In Case C-61/11 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte d'appello di Trento (Italy), made by decision of 2 February 2011, received at the Court on 10 February 2011, in the criminal proceedings against

Hassen El Dridi, alias Karim Soufi,

THE COURT (First Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 15 and 16 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The reference has been made in proceedings brought against Mr El Dridi, who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Questore di Udine (Chief of Police, Udine (Italy)).

Legal context

European Union legislation

3 Recitals 2, 6, 13, 16 and 17 in the preamble to Directive 2008/115 state:

'(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

…

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. …

…

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. …

…

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.'

4 Article 1 of Directive 2008/115, entitled 'subject-matter', provides:

'This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.'

5 Article 2(1) and (2) of that directive provides:

'1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

…

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.'

6 Article 3(4) of Directive 2008/115 defines the term 'return decision', for the purposes of that directive, as 'an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return'.

7 Article 4(3) of that directive states:

'This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.'

8 According to Article 6(1) of the same directive, 'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5'.

9 Article 7 of Directive 2008/115, entitled 'voluntary departure', is worded as follows:

'1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

…

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

10 Article 8(1) and (4) of that directive provides:

‘1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

…

4. Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.’

11 Article 15 of that same directive, under Chapter IV thereof, relating to detention for the purpose of removal, reads as follows:

‘1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

…

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.’

12 Article 16 of Directive 2008/115, entitled ‘Conditions of detention’, provides in paragraph 1:

‘Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.’

13 According to Article 18 of Directive 2008/115, entitled ‘Emergency situations’:

‘1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide … to take urgent measures in respect of the conditions of detention derogating from those set out in [Article] 16(1) … .

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.’

14 According to the first subparagraph of Article 20(1) of Directive 2008/115, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply therewith, with the exception of Article 13(4), by 24 December 2010.

15 Pursuant to Article 22 thereof, that directive entered into force on 13 January 2009.

National legislation

16 Article 13(2) and (4) of Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998), as amended by Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI No 170 of 24 July 2009) ('Legislative Decree No 286/1998'), provides:

'2. The expulsion shall be ordered by the prefect where the foreign national:

(a) entered the territory of the State without going through border control and has not been returned …;

(b) has remained on the territory of the State … without applying for a residence permit within the period imposed, except where that delay is due to *force majeure*, or despite the revocation or cancellation of the residence permit, or without applying for renewal of a residence permit which had expired over 60 days previously. ...

…

4. The expulsion shall always be carried out by the Questore with deportation by the law enforcement authorities, except as provided for in paragraph 5.'

17 Article 14 of Legislative Decree No 286/1998 is worded as follows:

'1. Where it is not possible to effect immediately the expulsion by deportation or return because it is necessary to provide assistance to the foreign national, conduct further checks on his identity or nationality, acquire travel documents, or because of the unavailability of the carrier or other suitable means of transport, the Questore shall order that the foreign national is to be detained, for the length of time which is strictly necessary, in the nearest detention centre among those identified or established by decree of the Minister for the Interior, in agreement with the Ministers for Social Solidarity and the Treasury, for the Budget and for Economic Planning.

…

5a. Where it is not possible to place the foreign national in a detention centre, or where the stay in such a centre has not allowed for the expulsion or return by deportation to be carried out, the Questore shall order the foreign national to leave the territory of the State within five days. The order shall be in writing and state the consequences of the illegal stay on the territory of the State in terms of penalties, including in the event of a repeat offence. The order of the Questore may include the presentation to the person concerned of the documents necessary to go to the diplomatic mission or consular post of his country in Italy, and also to return to the country to which he belongs or, if that is not possible, to the country from which he came.

5b. A foreign national who remains illegally and without valid grounds on the territory of the State, contrary to the order issued by the Questore in accordance with paragraph 5a, shall be liable to a term of imprisonment of one to four years if the expulsion or the return has been ordered following an illegal entry into the national territory …, or if application has not been made for a residence permit or the person concerned has not declared his presence on the territory of the State within the period imposed where there is no *force majeure*, or if his residence permit has been revoked or cancelled. A term of imprisonment of six months to one year shall apply if the expulsion was ordered because the residence permit expired more than 60 days previously and application for renewal has not been made, or if the application for a residence permit was rejected … . In any event, save where the foreign national is placed in detention, a new expulsion order with deportation by the law enforcement authorities shall be issued for the non-execution of the removal order issued by the Questore pursuant to paragraph 5a. Where deportation is not possible, the provisions of paragraphs 1 and 5a of the present Article shall apply … .

5c. A foreign national who is the recipient of the expulsion order referred to in paragraph 5b and a new removal order as referred to in paragraph 5a and who remains illegally on the territory of the State shall be liable to a term of imprisonment of between one and five years. In any event, the provisions of the third and last sentences of paragraph 5b shall apply.

5d. Where the offences referred to in the first sentence of paragraph 5b and paragraph 5c are committed, the rito direttissimo [expedited procedure] shall be followed and the arrest of the perpetrator shall be mandatory.'

The dispute in the main proceedings and the question referred for a preliminary ruling

18 Mr El Dridi is a third-country national who entered Italy illegally and does not hold a residence permit. A deportation decree was issued against him by the Prefect of Turin (Italy) on 8 May 2004.

19 An order requiring his removal from the national territory, issued on 21 May 2010 by the Questore di Udine pursuant to that deportation decree, was notified to him on the same day. The reasons for that removal order were that no vehicle or other means of transport was available, that Mr El Dridi had no identification documents and that it was not possible for him to be accommodated at a detention facility as no places were available in the establishments intended for that purpose.

20 A check carried out on 29 September 2010 revealed that Mr El Dridi had not complied with that removal order.

21 Mr El Dridi was sentenced at the conclusion of an expedited procedure by a single judge of the Tribunale di Trento (District Court, Trento) (Italy) to one year's imprisonment for the offence set out in Article 14(5b) of Legislative Decree No 286/1998.

22 He appealed against that decision before the Corte d'appello di Trento (Appeal Court, Trento).

23 That court is in doubt as to whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation, to the need for attainment of the objectives of Directive 2008/115 and for ensuring the effectiveness thereof, and also to the principle that the penalty must be proportionate, appropriate and reasonable.

24 It states in that regard that the criminal penalty provided for in Article 14(5b) of Legislative Decree No 286/1998 comes into play subsequent to the finding of an infringement of an intermediate stage of the gradual procedure for implementing the return decision, provided for by Directive 2008/115, namely non-compliance simply with the removal order. A term of imprisonment of one to four years seems, moreover, to be extremely severe.

25 In those circumstances, the Corte d'appello di Trento decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, do Articles 15 and 16 of Directive 2008/115 … preclude:

– the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?

– the possibility of a sentence of up to four years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with?'

The urgent procedure

26 The Corte d'appello di Trento asked for the reference for a preliminary ruling to be dealt with under the urgent procedure pursuant to Article 104b of the Court's Rules of Procedure.

27 The referring court justified its request by stating that Mr El Dridi is being detained in order to enforce the sentence imposed on him by the Tribunale di Trento.

28 The First Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under the urgent procedure.

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

30 The national court refers in that regard to the principle of sincere cooperation laid down in Article 4(3) TEU, and to the objective of ensuring the effectiveness of European Union law.

31 It must be borne in mind in that regard that recital 2 in the preamble to Directive 2008/115 states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity.

32 As is apparent from both its title and Article 1, Directive 2008/115 establishes 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals. It follows from that expression, but also from the general scheme of that directive, that the Member States may depart from those standards and procedures only as provided for therein, inter alia in Article 4.

33 It follows that, although Article 4(3) allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it, that directive does not however allow those States to apply stricter standards in the area that it governs.

34 It should also be observed that Directive 2008/115 sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.

35 Thus, Article 6(1) of the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory.

36 As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days.

37 It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.

38 In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.

39 In that regard, it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.

40 Under the second subparagraph of Article 15(1) of Directive 2008/115, that deprivation of liberty must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Under Article 15(3) and (4), such deprivation of liberty is subject to review at reasonable intervals of time and is to be terminated when it appears that a reasonable prospect of removal no longer exists. Article 15(5) and (6) fixes the maximum duration of detention at 18 months, a limit which is imposed on all Member States. Article 16(1) of that directive further requires that the persons concerned are to be placed in a specialised facility and, in any event, kept separated from ordinary prisoners.

41 It follows from the foregoing that the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.

42 It is clear that even the use of the latter measure, which is the most serious constraining measure allowed under the directive under a forced removal procedure, is strictly regulated, pursuant to Articles 15 and 16 of that directive, inter alia in order to ensure observance of the fundamental rights of the third-country nationals concerned.

43 In particular, the maximum period laid down in Article 15(5) and (6) of Directive 2008/115 serves the purpose of limiting the deprivation of third-country nationals' liberty in a situation of forced removal (Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189, paragraph 56). Directive 2008/115 is thus intended to take account both of the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person

against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued (see, inter alia, ECHR, *Saadi* v *United Kingdom*, 29 January 2008, not yet published in the *Reports of Judgments and Decisions*, § 72 and 74), and of the eighth of the 'Twenty guidelines on forced return' adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe, referred to in recital 3 in the preamble to the directive. According to that guideline, any detention pending removal is to be for as short a period as possible.

44 It is in the light of those considerations that it must be assessed whether the common rules introduced by Directive 2008/115 preclude national legislation such as that at issue in the main proceedings.

45 It should be observed in that regard first that, as is apparent from the information provided both by the referring court and by the Italian Government in its written observations, Directive 2008/115 has not been transposed into Italian law.

46 According to settled case-law, where a Member State fails to transpose a directive by the end of the period prescribed or fails to transpose the directive correctly, the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals against the State (see, to that effect, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 46, and Case C-203/10 *Auto Nikolovi* [2011] ECR I-0000, paragraph 61).

47 That is true of Articles 15 and 16 of Directive 2008/115, which, as is clear from paragraph 40 of this judgment, are unconditional and sufficiently precise, so that no other specific elements are required for them to be implemented by the Member States.

48 Moreover, a person in Mr El Dridi's situation comes within the personal scope of Directive 2008/115, since, under Article 2(1) thereof, that directive applies to third-country nationals staying illegally on the territory of a Member State.

49 As observed by the Advocate General in points 22 to 28 of his View, that finding is not affected by Article 2(2)(b) of that directive, which allows Member States to decide not to apply the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. The order for reference indicates that the obligation to return results, in the main proceedings, from a decree of the Prefect of Turin of 8 May 2004. Moreover, the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure.

50 It must be observed, second, that even though the decree of the Prefect of Turin of 8 May 2004, in so far as it establishes an obligation for Mr El Dridi to leave the national territory, is a 'return decision' as defined in Article 3(4) of Directive 2008/115 and referred to, inter alia, in Articles 6(1) and 7(1) thereof, the removal procedure provided for by the Italian legislation at issue in the main proceedings is significantly different from that established by that directive.

51 Thus, whilst that directive requires that a period of between seven and 30 days be granted for voluntary departure, Legislative Decree No 286/1998 does not provide for recourse to that measure.

52 Next, as regards the coercive measures which the Member States may implement under Article 8(4) of Directive 2008/115, such as, inter alia, deportation as provided for by Article 13(4) of Legislative Decree No 286/1998, it is clear that in a situation where such measures have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued, the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States' territory.

53 It should be noted, however, that, although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by European Union law (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Case 186/87 *Cowan* [1989] ECR 195, paragraph 19; and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19).

54 It follows that, notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with European Union law.

55 In particular, those States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

56 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives.

57 Regarding, more specifically, Directive 2008/115, it must be remembered that, according to recital 13 in the preamble thereto, it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

58 Consequently, the Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence, such as that provided for by Article 14(5b) of Legislative Decree No 286/1998, on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.

59 Such a penalty, due inter alia to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals. In particular, as observed by the Advocate General in point 42 of his View, national legislation such as that at issue in the main proceedings is liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay the enforcement of the return decision.

60 That does not preclude the possibility for the Member States to adopt, with respect for the principles and objective of Directive 2008/115, provisions regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory.

61 In the light of the foregoing, it will be for the national court, which is called upon, within the exercise of its jurisdiction, to apply and give full effect to provisions of European Union law, to refuse to apply any provision of Legislative Decree No 286/1998 which is contrary to the result of Directive 2008/115, including Article 14(5b) of that legislative decree (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraphs 38 and 40; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-0000, paragraph 43). In so doing, the referring court will have to take due account of the principle of the retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States (Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 to 69, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59).

62 Consequently, the answer to the question referred is that Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

3. CJEU C-329/11, Achugbabian, 6 December 2011

JUDGMENT OF THE COURT (Grand Chamber)

6 December 2011 (*)

(Area of freedom, security and justice – Directive 2008/115/EC – Common standards and procedures for returning illegally staying third-country nationals – National legislation making provision, in the event of illegal staying, for a sentence of imprisonment and a fine)

In Case C-329/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour d'appel de Paris (France), made by decision of 29 June 2011, received at the Court on 5 July 2011, in the proceedings

Alexandre Achughbabian

v

Préfet du Val-de-Marne,

THE COURT (Grand Chamber),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The reference was made in the context of a dispute between Mr Achughbabian and the Prefect of Val-de-Marne concerning Mr Achughbabian's illegal stay in French territory.

Legal context

Directive 2008/115

3 Recitals 4, 5 and 17 in the preamble to Directive 2008/115 state:

'(4) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.

(5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

…

(17) Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.'

4 Article 1 of Directive 2008/115, entitled 'subject-matter', provides:

'This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.'

5 Article 2 of the Directive, headed 'Scope', provides:

'1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry …, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State …;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

…'

6 Article 3 of the said directive, headed 'Definitions' provides:

'For the purposes of this Directive …:

…

2. "illegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions … for entry, stay or residence in that Member State;

3. "return" means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:

– his or her country of origin, or

– a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

– another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

4. "return decision" means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

5. "removal" means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

…'

7 Articles 6 to 9 of Directive 2008/115 state:

'Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. …

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State …

4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. …

5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished …

…

Article 7

Voluntary departure

1. A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. …

…

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Article 8

Removal

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

…

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

…

Article 9

Postponement of removal

1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted [following an action brought against a decisions related to return].

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:

(a) the third-country national's physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.'

8 Articles 15 and 16 of Directive 2008/115 are worded as follows:

'Article 15

Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding, or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

…

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Article 16

Conditions of detention

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention are to be kept separated from ordinary prisoners.

…'

9 Under Article 20 of Directive 2008/115, Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive no later than 24 December 2010.

National legislation

The code de l'entrée et du séjour des étrangers et du droit d'asile

10 According to Article L. 211-1 of the code de l'entrée et du séjour des étrangers et du droit d'asile français ('Ceseda'), 'in order to enter France, any foreign national must hold … the documents and visas required by the international conventions and the regulations in force …'.

11 According to Article L-311-1 of that code, 'any foreign national aged over 18 years wishing to stay in France must, after the expiry of a period of three months from his entry into France, hold a residence permit'.

12 Article L. 551-1 of Ceseda, in the version in force at the material time, was worded as follows:

'The detention of a foreign national in premises not falling under the prisons administration may be ordered where that foreign national:

…

3° although subject to a deportation order … issued less than one year previously, or having to be deported pursuant to a prohibition from French territory under the penal code, cannot immediately leave French territory; or

…

6° although subject to an obligation to leave French territory imposed … less than one year previously and in respect of which the one-month period for voluntarily leaving the territory has expired, cannot immediately leave that territory.'

13 The first sentence of Article L. 552-1 of Ceseda, in the version in force at the material time, provided that 'where a period of 48 hours has elapsed since the detention decision, application must be made to the juge des libertés et de la détention [liberty and custody judge] for extending the detention'.

14 Article L. 621-1 of Ceseda provides:

'A foreign national who has entered or resided in France without complying with the provisions of Articles L. 211-1 and L. 311-1 or who has remained in France beyond the period authorised by his visa commits an offence punishable by one year's imprisonment and a fine of EUR 3 750.

The court may, further, prohibit a convicted foreign national, for a period which may not exceed three years, from entering or residing in France. Prohibition from the territory automatically entails deportation, where appropriate at the expiry of the term of imprisonment.'

15 Some of the provisions of Ceseda were amended by Law No 2011-672 of 16 June 2011 on immigration, integration and nationality (loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité (JORF of 17 July 2011, p. 10290)), which entered into force on 18 July 2011. Article 621-1 of Ceseda is not among the amended provisions.

The Code of Criminal Procedure

16 Article 62-2 of the Code of Criminal Procedure (code de procédure pénale), in the version in force at the material time, provides:

'Police custody is a coercive measure decided upon by a police officer, under the control of the courts, whereby a person reasonably suspected on one or more grounds of committing or attempting to commit an offence punishable by imprisonment is held at the disposal of investigators'

The dispute in the main proceedings and the reference for a preliminary ruling

17 On 24 June 2011, at Maisons-Alfort (France), identity checks were carried out on the public highway by the police. One of the individuals questioned in the course of those checks stated that his name was Alexandre Achughbabian and that he was born in Armenia on 9 July 1990.

18 According to the police record, Mr Achughbabian also stated that he was of Armenian nationality. He denies making that statement, however.

19 Being suspected of committing and continuing to commit the offence set out in Article L. 621-1 of Ceseda, Mr Achughbabian was placed in police custody.

20 A more detailed examination of Mr Achughbabian's situation then revealed that he had entered France on 9 April 2008 and had applied there for a residence permit, that that application had been rejected on 28 November 2008, and that that rejection had been confirmed on 27 January 2009 by the Prefect of Val-d'Oise accompanied by an order of the latter, notified to Mr Achughbabian on 14 February 2009, imposing an obligation to leave French territory within one month.

21 On 25 June 2011, a deportation order and an administrative detention order were adopted by the Prefect of Val-de-Marne and served on Mr Achughbabian.

22 On 27 June 2011, the juge des libertés et de la détention of the Tribunal de grande instance de Créteil, to whom application had been made under Article L. 552-1 of Ceseda for an extension of the detention beyond 48 hours, ordered that extension and dismissed the objections of invalidity raised by Mr Achughbabian against, inter alia, the police custody into which he had just been placed.

23 One of those objections was based on the judgment of 28 April 2011 in Case C-61/11 PPU *El Dridi* [2011] ECR I-0000, in which the Court of Justice held that Directive 2008/115 precludes legislation of a Member State, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period. According to Mr Achughbabian, it follows from that judgment that the sentence of imprisonment provided for by Article L. 621-1 of Ceseda is incompatible with EU law. Having regard to that incompatibility and the rule that police custody may be imposed only where there is suspicion of an offence punishable by a sentence of imprisonment, the procedure followed in this case is, he submits, unlawful.

24 On 28 June 2011, Mr Achughbabian appealed against the order of the juge des libertés et de la détention of the Tribunal de grande instance de Créteil to the Cour d'appel de Paris. The latter took note that Mr Achughbabian was of Armenian nationality, that he had been placed in police custody and then in detention for an unlawful stay, and that he had argued that Article L. 621-1 of Ceseda is incompatible with Directive 2008/115, as interpreted in *El Dridi*.

25 In those circumstances, the Cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Taking into account its scope, does Directive [2008/115] preclude national legislation, such as Article L. 621-1 of [Ceseda], which provides for the imposition of a sentence of imprisonment on a third-country national on the sole ground of his illegal entry or residence in national territory?'

26 The referring court, moreover, terminated Mr Achughbabian's detention.

27 At the request of the referring court, the designated chamber examined the need to deal with the present case under the urgent preliminary ruling procedure provided for in Article 104b of the Rules of Procedure. The said chamber decided, after hearing the Advocate General, not to accede to that request.

The question referred for a preliminary ruling

28 It should be noted at the outset that Directive 2008/115 concerns only the return of illegally staying third-country nationals in a Member State and is thus not designed to harmonise in their entirety the national rules on the stay of foreign nationals. Therefore, that directive does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence.

29 Since the common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions, it should also be pointed out that that directive does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.

30 That finding is corroborated by recital 17 of that directive, from which it is apparent that the conditions for the initial arrest of third-country nationals suspected of staying in a Member State illegally remain governed by national law. Moreover, as the French Government has

observed, the objective of Directive 2008/115, namely the effective return of illegally-staying third-country nationals, would be undermined if it were impossible for Member States, by deprivation of liberty such as police custody, to prevent a person suspected of staying illegally from fleeing before his situation has even been able to be clarified.

31 It should be held, in that regard, that the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee. That being so, the competent authorities are required, in order to prevent the objective of Directive 2008/115, as stated in the paragraph above, from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned. Once it has been established that the stay is illegal, the said authorities must, pursuant to Article 6(1) of the said directive and without prejudice to the exceptions laid down by the latter, adopt a return decision.

32 Whilst it is apparent from the above that Directive 2008/115 does not preclude either national legislation, such as Article L. 621-1 of Ceseda, in so far as the latter classifies an illegal stay by a third-country national as an offence and provides for penal sanctions, including a term of imprisonment, to prevent such a stay, or the detention of a third-country national in order to determine whether or not his stay is legal, it needs next to be examined whether that directive precludes legislation such as Article L. 621-1 of Ceseda in so far as it is capable of leading to an imprisonment in the course of the return procedure governed by the said directive.

33 In that respect, the Court has already held that whilst, in principle, criminal legislation and the rules of criminal procedure fall within the competence of the Member States, this area of law may nevertheless be affected by EU law. Therefore, notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with EU law. Those States cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness (*El Dridi*, paragraphs 53 to 55 and case-law cited).

34 In considering the question whether, for reasons similar to those set out by the Court in *El Dridi*, Directive 2008/115 precludes legislation such as Article L. 621-1 of Ceseda, it must be held, first of all, that the situation of the applicant in the main proceedings falls within that referred to in Article 8(1) of that directive.

35 It is apparent from the documents before the Court and from the reply given by the referring court to a request for clarification from the Court of Justice that an order to leave French territory, setting a period of one month for a voluntary departure, was served on Mr Achughbabian on 14 February 2009, and that the latter did not comply with that order. As that return decision was no longer operative on 24 June 2011, the date on which Mr Achughbabian was apprehended and placed in police custody, a fresh return decision was adopted on 25 June 2011, this time taking the form of a deportation order, not accompanied by a period for voluntary departure. It follows that, independently of the question whether the situation of the applicant in the main proceedings must be regarded as that of a person who has not complied with a return obligation in the time-limit granted for a voluntary departure or as that of a person subject to a return decision without the fixing of a time-limit for a voluntary departure, the said situation is in any event covered by Article 8(1) of Directive 2008/115 and thus gives rise to the obligation imposed by that article on the Member State concerned to take all measures necessary to carry out removal, namely, pursuant to Article 3, point 5, of the said directive, the physical transportation of the person concerned out of the said Member State.

36 It should be stated, next, that it is obvious from Article 8(1) and (4) of Directive 2008/115 that the expressions 'measures' and 'coercive measures' contained therein refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned. Article 15 of the said directive provides that detention of the person concerned is permitted only for the purposes of preparing and permitting the removal and that that deprivation of liberty can be maintained only for a maximum duration of 6 months, an additional period of detention of 12 months being capable of being added only where non-implementation of the return decision during the said 6 months is due to a lack of cooperation from the person concerned or delays in obtaining the necessary documentation from third countries.

37 Clearly, the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by Directive 2008/115 does not contribute to the realisation of the removal which that procedure pursues, namely the physical transportation of the person concerned outside the Member State concerned. Such a sentence does not therefore

constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of Directive 2008/115.

38 Finally, it is undisputed that the national legislation at issue in the main proceedings, in that it provides for a term of imprisonment for any third-country national aged over 18 years who stays in France illegally after the expiry of a period of three months from his entry into French territory, is capable of leading to an imprisonment whereas, following the common standards and procedures set out in Articles 6, 8, 15 and 16 of Directive 2008/115, such a third-country national must, as a matter of priority, be made the subject-matter of a return procedure and may, as regards deprivation of liberty, be subject at most to placing in detention.

39 National legislation such as that at issue in the main proceedings is, consequently, likely to thwart the application of the common standards and procedures established by Directive 2008/115 and delay the return, thereby, like the legislation at issue in *El Dridi*, undermining the effectiveness of the said directive.

40 The above conclusion is not called into question either by the fact, invoked by the French Government, that, pursuant to circulars sent to the courts, the penalties laid down by the national legislation at issue in the main proceedings are rarely imposed outside cases where the person staying illegally has, in addition to the offence of staying illegally, also committed another offence, or by the fact, likewise invoked by that government, that Mr Achughbabian has not been sentenced to those penalties.

41 In that respect, it is important to note at the outset that third-country nationals who, in addition to staying illegally, have also committed one or more other offences may in certain cases, under Article 2(2)(b) of Directive 2008/115, be removed from the scope of the latter. However, there is nothing in the evidence before the Court to suggest that Mr Achughbabian has committed any offence other than that consisting in staying illegally on French territory. The situation of the applicant in the main proceedings cannot therefore be removed from the scope of Directive 2008/115, as Article 2(2)(b) of the latter clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying.

42 As regards the fact that Mr Achughbabian has, hitherto, not been sentenced to the penalties of imprisonment and fine laid down by Article L. 621-1 of Ceseda, it should be noted that the adoption against him of a deportation order has undeniably been based on the finding of the offence of illegal staying provided for by that article, and that the latter is, whatever the content of the circulars mentioned by the French Government, capable of leading to a sentence to the said penalties. Consequently, Article L. 621-1 of Ceseda, and the question of its compatibility with EU law, are relevant in the file of the applicant in the case in the main proceedings, the referring court and the French Government having moreover mentioned neither a withdrawal of proceedings nor, more generally, any decision definitively excluding the possibility of prosecution against Mr Achughbabian for the said offence.

43 Moreover, and analogously with what has been stated in paragraph 33 of this judgment, this Court emphasises the duty of the Member States, following from Article 4(3) TEU and referred to in paragraph 56 of the judgment in *El Dridi*, to take any appropriate measure to ensure fulfilment of the obligations arising from Directive 2008/115 and to refrain from any measure which could jeopardise the attainment of the objectives of the latter. It is important that the national provisions applicable must not be capable of compromising the proper application of the common standards and procedures introduced by the said directive.

44 Finally, this Court cannot accept the line of argument of the German and Estonian Governments, according to which, whilst Articles 8, 15 and 16 of Directive 2008/115 prevent a term of imprisonment from being imposed during the removal procedure provided for in those articles, they do not prevent a Member State from sentencing an illegally staying third-country national to a term of imprisonment before carrying out the removal of that person in accordance with the rules laid down by the directive.

45 It is sufficient to note in that respect that it follows both from the duty of loyalty of the Member States and the requirements of effectiveness referred to, for example, in recital 4 of Directive 2008/115, that the obligation imposed on the Member States by Article 8 of that directive, in the cases set out in Article 8(1), to carry out the removal, must be fulfilled as soon as possible. That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution followed, in appropriate cases, by a term of imprisonment. Such a step would delay the removal (*El Dridi*, paragraph 59) and does not, moreover, appear amongst the justifications for a postponement of removal referred to in Article 9 of Directive 2008/115.

46 Whilst it is apparent from the above considerations as a whole that Member States bound by Directive 2008/115 cannot provide for a term of imprisonment for illegally-staying third-country nationals in situations in which the latter must, by virtue of the common standards and

procedures established by that directive, be removed and may, with a view to preparation and implementation of that removal at the very most be subject to detention, that does not exclude the possibility of Member States adopting or maintaining provisions, which may be of a criminal nature, governing, in compliance with the principles of the said directive and its objective, the situation in which coercive measures have not enabled the removal of an illegally staying third-country national to take place (*El Dridi*, paragraphs 52 and 60).

47 Having regard to that possibility, it must be held that the argument put forward by the governments which have made submissions before the Court, according to which an interpretation such as that given above would put an end to the possibility of Member States deterring illegal stays, is unfounded.

48 In particular, Directive 2008/115 does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return.

49 In that regard, it should be emphasised that, in the context of the application of the said rules of criminal procedure, the imposition of the sanctions mentioned in the previous paragraph is subject to full compliance with fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

50 In the light of all the foregoing, the answer to the question is that Directive 2008/115 must be interpreted as:

– precluding legislation of a Member State repressing illegal stays by criminal sanctions, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, in the event of placing in detention with a view to the preparation and implementation of his removal, reached the expiry of the maximum duration of that detention; and

– not precluding such legislation in so far as the latter permits the imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified ground for non-return.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as

– **precluding legislation of a Member State repressing illegal stays by criminal sanctions, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, in the event of placing in detention with a view to the preparation and implementation of his removal, reached the expiry of the maximum duration of that detention; and**

– **not precluding such legislation in so far as the latter permits the imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified ground for non-return.**

E. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

F. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals